THE
INCORPORATED COUNCIL OF LAW REPORTING
FOR
ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. WARMINGTON, Esq., Q. C.

Vice-Chairman—F. A. BOSANQUET, Esq., Q. C.

EX-OFFICIO MEMBERS.

SIR ROBERT B. FINLAY, Knt., M. P. . . ATTORNEY-GENERAL.

THE RIGHT HON. SIR EDWARD CARSON, Knt., M. P. } SOLICITOR-GENERAL.

ROBERT ELLETT, Esq., President of the Incorporated Law Society.

ELECTED MEMBERS.

W. C. RENSHAW, Esq., Q. C.
T. ROLLS WARRINGTON, Esq. Q. C. } Lincoln's Inn.

F. A. BOSANQUET, Esq., Q. C.
M. C. BUSZARD, Esq., Q. C. } Inner Temple.

C. M. WARMINGTON, Esq., Q. C.
A. T. LAWRENCE, Esq., Q. C. } Middle Temple.

JAMES MULLIGAN, Esq., Q. C.
J. C. LEWIS COWARD, Esq. } Gray's Inn.

W. ENGLISH HARRISON, Esq., Q.C. of the Middle Temple.
ROBERT F. NORTON, Esq., Q.C., of Lincoln's Inn. } Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.

JOHN HOLLAMS, Esq. (Firm-Messrs. Hollams, Sons. Coward & Hawksley), 30, Mincing Lane, E. C.
E. J. BRISTOW, Esq. (Firm—Messrs, Wilson, Bristows & Carpmael), 1, Copthall Buildings, E.C. } Incorporated Law Society.

Secretary—PATRICK F. EVANS, Esq., 10 Old Square Lincoln's Inn.

THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals :

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law*
REPORTED BY HERBERT COWELL,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

VOL. XXVII.—1899-1900.

LONDON :
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET ; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1900

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED
STAMFORD STREET AND CHARING CROSS.

WITH THE KIND PERMISSION OF THE INCORPORATED COUNCIL OF LAW REPORTING
REPRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE, MADRAS.

LIST

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1900.

Earl of *Halsbury*, Lord Chancellor.
Duke of *Devonshire*, Lord Presidents.
Earl of *Rosebery*.
The Marquis of *Ripon*.
Earl *Spencer*.
Earl of *Kimberley*.
Earl of *Cranbrook*.
Duke of *Richmond and Gordon*.
Lord *Hobhouse*.
Lord *Macnaghten*.
Lord *Morris*
Lord *Davey*.

Lord *Field*.
Lord *Shand*.
Lord *Brampton*.
Lord *Robertson*.
Lord *Lindley*.
Lord *James of Hereford*.
Sir *Richard Couch*.
Sir *Edward Fry*.
Sir *Henry De Villiers*, K.C.M.G.
Sir *Henry Strong*.
Sir *Samuel Way*, Bart.
Sir *Ford North*.

And others ex officio under the Appellate Jurisdiction Acts of 1876 (39 & 40 *Vict*, *c* 50) *and* 1887 (50 & 51 *Vict. c.* 70) *and the Judicial Committee Amendment Act*, 1895.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE

Ah Shain Shoke *v.* Moothia Chetty 30
Amrito Lal Dutt *v.* Surnomoye Dasi 128

Balkishen Das *v.* Legge . 58

Fatimatulnissa Begum *v.* Soonder Das 103

Garurudhwaja Parshad Singh *v.* Saparandhwaja Parshad Singh 238
Girish Chunder Lahiri *v.* Shoshi Shikhareswar Roy. . 110
Gnanasambanda Pandara Sannadhi *v.* Velu Pandaram . 69

Haranund Roy Chetlangia *v.* Ram Gopal Chetlangia . 1
Hodges *v.* Delhi and London Bank, Limited . . . 168

Luchmi Koer *v.* Chowdhry Mohunt Roghu Nath Das . 142

PAGE

Mahomed Meera Ravuthar *v.* Savvasi Vijaya Raghunadha Gopalar 17
Malkarjun bin Shidramappa Pasare *v.* Narhari bin Shivappa 216

Monmohini Debi *v.* Robert Watson & Co 44

Moung Tha Hnyeen *v.* Moung Pan Nyo 166
Moung Tha Hnyin *v.* Mah Thein Myah 189

Padapa Bin Bhujangapa *v.* Swamirao Shriniwas . . 86

Radhamoni Debi *v.* The Collector of Khulna . . . 136
Raja Bhup Indar Bahadur Singh *v.* Bijai Bahadur Singh. 209
Rajah Kotagiri Venkata Subbamma Rao *v.* Rajah Vellanki Venkatrama Rao . 197

PAGE

Raja Yarlagadda Mallikarjuna Prasada Nayudu *v.* Raja Yarlagadda Durga Prasada Nayudu. Raja Yarlagadda Mallikarjuna Prasada Nayudu *v.* Raja Yarlagadda Venkaia Ramalingamma . 151
Rewa Prasad Sukal *v.* Deo Dutt Ram Sukal . . . 39
Roshan Singh *v.* Balwant Singh 51

Sal Lal Chand *v.* Indarjit . 93
Sardar Jagjot Singh *v.* Rani Brijnath Kunwar . . . 81
Shama Churn Kundu *v.* Khettromoni Dasi . . . 10
Subbarayer *v.* Subbammal . 162
Surjan Singh *v.* Sardar Singh . 183

Tara Lal Singh *v.* Sarobur Singh 33
Thakur Shankar Buksh *v.* Balwant Singh 79
Thiruthipalli Raman Menon *v.* Variangattil Palisseri Raman Menon 231

Yeo Htean Sew *v.* Abu Zaffer Koreeshee 98

TABLE OF CASES CITED.

A.

		PAGE.
Abbott *v.* Middleton	7 H. L. C. 68	132
Alami *v.* Komu	Ind. L. R. 12 Mad. 126	234
Alderson *v.* White	2 De G. & J. 97	60, 61
Ali Ahmad *v.* Rahmat-ullah	Ind. L. R. 14 Allah. 195.	62
Anando Kishore Dass Bakshi *v.* Anando Kishore Bose	Ind. L. R. 14 Calc. 53	211
Azim Sarung *v.* Alimooddeen	17 Suth W. R. 270	115, 122

B.

Babaji *v.* Nana	Ind. L. R. 1 Bomb. 535n.	74
Bai *v.* Motivahoo *v.* Bai Mamoobai	L. R. 24 Ind. Ap. 93	131
Baksha Lakshman v. Govinda Kanji	Ind. L. R. 4 Bomb, 594	61
Balwant Rao *v.* Puran Mal Chaube	L. R. 10 Ind. Ap. 90	72
Barry *v.* Batlin	2 Moore P. C. 480	10, 11
Bejai Bahadur Singh *v.* Bhupindar	L. R. 22 Ind. Ap. 139	185
Bhagvant Govind *v.* Kondi	Ind. L. R. 14 Bomb. 279	219, 229
Bhagwan Sahai *v.* Bhagwan Din	L. R. 17 Ind. Ap. 98.	59, 60, 62, 67
Bhup Kuar v. Muhammadi Begum	Ind. L. R. 6 Allah 37	61
Brown *v.* Fisher	63 L T. 465	11

C.

Coaks *v.* Boswell	11 App. Ca 232	20, 27
Chuoturya Run Murdun Syn v. Sahub Purhulad Syn	7 Moore's Ind. Ap. Ca. 50.	51, 54, 56
Citizens' Bank of Louisiana *v.* First National Bank of New Orleans	L. R. 6 H L. 360	103, 108
Cowell *v.* Watts	2 H. & T. 224	191

D.

Davies *v.* London and Provincial Marine Insurance Co.	8 Ch. D. 469	171
Doorga Singh *v.* Sheo Pershad Singh	Ind. L. R. 16 Calc. 194	21

F.

Fakharuddin Ahsan Chowdhry *v.* Official Trustee of Bengal	L. R. 8 Ind Ap. 197	211

		PAGE.
Fanindra Deb Raikat *v.* Rajeswar Dass .	L. R. 12 Ind. Ap. 72 .	163, 164
Forbes *v.* Ameeroonissa Begum .	10 Moore's Ind. Ap. Ca. 346.	61, 62
Fulton *v.* Andrew . . .	L. R. 7 H. L. 448 . .	11

G.

Girischunder Lahiri *v.* Shikhareswar Roy	L. R. 27 Ind. Ap. 110 .	211
Gossamee Sree Greedharreejee *v.* Rumanlalljee Gossamee . .	L. R. 16 Ind. Ap. 137 .	72

H.

Hargobind Kuari *v.* Dharam Singh .	Ind. L. R. 6 Allah. 329 .	54
Hukum Chand *v.* Hiralal . .	Ind. L. R. 3 Bomb. 159 .	95
Hunter *v.* Attorney General	(1899) A. C. 309 . .	132
Hurrinath Chatterji *v.* Mohunt Mothoor Mohun Goswami . . .	L. R. 20 Ind. Ap. 183 .	73
Hurro Doorga Chowdhrani *v.* Maharani Surut Soondari Debi . . .	L. R. 9 Ind. Ap. 1 . .	114

J.

Jamal Saheb *v.* Murgaya Swami .	Ind. L. R. 10 Bom. 34 .	74
Jewun Doss Sahoo *v.* Shah Kubeeroodeen	2 Moore's Ind. Ap. Ca. 390 .	74
Jivi *v.* Ramji	Ind, L. R. 3 Bomb 207	153,155,158

K.

Kalliyani *v.* Narayana . . .	Ind L. R. 9 Mad. 266 .	234
Kalu Narayan Kulkarni *v.* Hanmapa bin Bhimapa . , . .	Ind. L. R. 5 Bomb. 435	86, 90
Kannan v. Nilakandan . .	Ind. L. R. 7 Mad. 337	71, 73, 74
Karimshah *v.* Nattan Bivi . ,	Ind. L. R. 7 Mad. 417	73, 74
Kishna Nand *v.* Kunwar Partab Narain Singh . . .	L. R. 11 Ind. Ap. 88	114. 124
Kubra Bibi v. Wajid Khan . .	Ind. L. R. 16 Allah. 59 .	. 62
Kuria bin Hanmia v. Gururav . .	9 Bomb. H. C. 282 .	. 74

L.

Lachmi Pershad *v.* Narendro Kishore .	L. R. 19 Ind Ap. 9 . .	170
Lakshmipathi *v.* Kandasami . .	Ind. L. R. 16 Mad. 54 .	154
Lala Himmat Sahai Singh *v.* Llewhellen	Ind. L. R. 11 Calc. 486 .	95
Lalli *v.* Ramprasad . . .	Ind. L. R. 9 Allah. 74 .	171
Lopez *v.* Mudden Mohun Thakoor .	13 Moore's Ind. Ap. Ca. 467 .	82
Luchmee Baksh Roy *v.* Runjeet Ram Panday	13 Beng. L. R. 177 . .	105

M

Madhava *v.* Narayana . . .	Ind. L. R. 9 Mad. 244 .	71
Mahalakshmamma *v.* Venkataratnamma .	Ind. L. R. 6 Mad. 83	155 158

		PAGE
Mahomed *v.* Ganapati	Ind. L. R. 13. Mad. 277	74
Mahomed Buksh Khan *v.* Hosseini Bibi	L. R. 15 Ind. Ap. 81	172
Manchester, Sheffield and Lincolnshire Ry. Co. *v.* North Central Wagon Co..	13 App. Cas. 554	60
Mariam Bibi *v.* Sakina	Ind. L. R. 14 Allah. 8	170
Marshall *v.* Willder	9 B. & C. 655	172
Modho Kooery *v.* Tekait Ram	Ind. L. R. 9 Calc. 411	74
Mohunt Burm Suroop Dass *v.* Khashee Jha	20 Suth. W. R. 471	74
Motilal Prannath *v.* Bai Kashi	Ind. L. R. 17 Bomb 45	155, 159
Muhabir Pershad *v.* Radha Pershad Singh	Ind. L. R. 18 Calc. 540	115
Munda Chetti *v.* Timmaju Hensu	1 Madr. H. C. 380	234
Muppidi Papaya *v.* Ramana	Ind. L. R, 7 Bomb. 188	74

N

Narayanrao Ramchandra Pant *v.* Ramabai	L. R. 6 Ind. Ap. 114	155
Nawab Ahsanulla Khan *v.* Hurri Churn Mozoomdar	L. R. 19. Ind. Ap 191	21
Nidhoomoni Debya *v.* Saroda Pershad Mookerjee	L. R. 3 Ind. Ap. 253	163, 165
Nogender Chunder Ghose *v.* Mahomed Esof	10 Beng. L. R 406	82
Norway *v.* Rowe	19 Ves. 144	193

P

Pandaiya Telaver *v.* Puli Telaver	1 Madr. H. C. 478	53, 57
Pattabhiramier *v.* Vencatarow Naicken	13 Moore's Ind, Ap. Ca. 560	61. 66
Pittapur Case	L. R. 26. Ind. Ap. 83	163
President, &c.. of Magdalen Hospital *v.* Knotts	4 App. Cas. 324	72
Prosad Dass Dutt *v.* Ramdhone Mullick	1 Ind. Jur. 255	99
Puran Chand *v.* Roy Radha Kishen	Ind. L. R. 19 Calc. 132	211

R

Radhabai *v* Anantrav Bhagvant	Ind. L. R 9 Bomb. 198	71
Raghubans Kunwar *v.* Bhagwant Kunwar	Ind L. R. 21 Allah. 183	155
Rajah Varma Valia *v.* Kottayath	7. Madr. H. C. 210	72
Rajah Pirthee Singh *v.* Ranee Raj Kower	L. R. Ind. Ap. (Supp.) 203	154
Rajah Vurmah Valia *v.* Ravi Vurmah Mutha	L. R. 4 Ind. Ap. 76	69, 72, 76
Rakken *v.* Alagappudayan	Ind. L. R. 16 Mad. 80	61
Ramasami Sastrigal *v.* Samiyappa Nayakan	Ind. L. R. 4 Mad. 179	62
Rani Lekraj Kuar *v.* Mahpal Singh	7 L. R. Ind. Ap. 63	240
Ras Muni Dibiah *v.* Prankishen Das	4 Moore's Ind. Ap. Ca. 392	62
Rochefoucauld *v.* Boustead	1897] 1 Ch. 196	61
Roy Meghraj *v.* Beejoy Govind Burral	Ind. L. R. 1 Calc. 197	80, 205

S

Sakvaibai *v.* Bhavanji	1 Bomb. H. C. 194	155
Sartaj Kuari *v.* Deoraj Kuari	L. R. 15 Ind. Ap. 51	157

		PAGE
Senhouse *v* Christian . . .	19 Beav. 356 n. .	191
Seshamma v. Subbarayadu . .	Ind. L. R. 18. Mad. 403	155
Sheonath Doss *v*. Janki Prosad Singh .	Ind. L. R. 16 Calc. 132	21, 28
Situl Pershad *v*. Luchmi Pershad Singh	L. R. 10 Ind. Ap. 129 .	60
Subramanyan *v*. Paramaswaran .	Ind. L. R. 11. Mad. 116	234

T

Tagore v. Tagore . . . ,	L. R. Ind. Ap. (Supp.) 47	69, 78
Tassaduk Rasul Khan *v*. Ahmad Husain	L. R. 20 Ind. Ap. 176 .	20
Thakur Nitrpal Singh *v*. Thakur Jai Singh Pal	L. R. 23 Ind. Ap. 147 .	240, 250
Thumbasawmy Mudelly *v*. Mahomed Hossein Rowthen . . .	L. R. 2 Ind. Ap. 241 .	61
Trimbak Bawa *v*. Narayan Bawa .	Ind. L. R. 7 Bomb. 188	74, 77
Tyrrell *v*. Painton . . .	(1894) P. 151 . .	10

U

Uman Pershad *v*. Gandharp Singh .	L. R. 14 Ind. Ap. 127 .	185, 240

V

Vane *v*. Vane	L. R. 8 Ch. 383 .	73
Varanakot *v*. Varanakot . . .	Ind. L. R. 2 Mad. 330 .	234
Vasudevan *v*. Secretary of State for India	Ind, L. R. 11 Mad. 157	234
Vedapuratti *v*. Vallabha . .	Ind. L, R. 13 Mad. 402	74

W

Wajid Khan *v*. Raja Ewaz Ali Khan .	L. R. 18 Ind. Ap. 144 .	170
Woopendro Nath Sircar *v*. Brojendronath Mundul	Ind. L. R. 7 Calc. 346 .	21, 23

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

HARANUND ROY CHETLANGIA . . PLAINTIF; J. C.*

1899

AND

RAM GOPAL CHETLANGIA AND ANOTHER. DEFENDANTS. *Nov.* 10, 15; *Dec.* 9.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Indian Evidence Act, ss. 65, 66, 74, 86—*Uncertified Record of Proceedings in Court—Secondary Evidence—Public Document.*

The record of proceedings in a court of justice is presumed to be genuine and accurate if it is certified as directed by s. 86 of the Indian Evidence Act. But the proceedings may be proved by an official of the Court speaking to what takes place in his presence, and also to an uncertified record thereof. The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74), admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction.

APPEAL from a decree of the High Court (April 4, 1894) affirming a decree of the Subordinate Judge of Nuddea (Nov. 30, 1891) which had dismissed the appellant's suit.

The suit was brought to establish the appellant's right as adopted son of Shib Narain, deceased, and to recover one-half of the property of Shib Narain's father, Ram Buksh.

The question decided in this appeal was one of fact, whether Shib Narain's widow, Chuni Bibi, had authority from her husband to adopt the appellant. Incidentally, the question

* *Present*: THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C.* 1899

HARANUND ROY CHETLANGIA v. RAM GOPAL CHETLANGIA

arose whether certain proceedings in the Court of the Maharajah of Sikhur were sufficiently authenticated to be admissible in evidence as sewing that Ram Buksh disputed the adoption, while Chuni supported it without at that time even alleging her own authority from her husband.

The Subordinate Judge did not record any finding as to the execution of the power, but he held that by the Mitakshara law, as it prevailed in the native State of Jeypore, which includes Sikhur, an authority to adopt could not be legally carried out without the assent of the head of the family—that is, of Ram Buksh. He accordingly dismissed the suit.

The High Court affirmed his decree.

As regards the proceedings in the Sikhur Courts, both judges refused to accept them as in any way conclusive upon the validity of the adoption. Both judges commented on the fact that they were not certified by the political agent under s. 86 of the Evidence Act. Prinsep, J. relied on this circumstance as destroying the proof that the Court was one of competent jurisdiction. Ameer Ali, J. considered it as rendering the whole series of documents inadmissible in evidence.

As to the authority to adopt proceeding from Shib Narain, Prinsep, J. inferentially, and Ameer Ali, J. expressly, rejected the evidence in support of it. Both judges found that such an authority was necessary, and that if it was not given the adoption failed.

As to the necessity for consent by Ram Buksh, Prinsep, J, inclined to think it was necessary. Ameer Ali, J. was of the contrary opinion. Both agreed that no such consent had ever been given.

As to the factum of adoption, Prinsep, J. said: It is at least doubtful whether the ceremony said to have been performed was regular and valid." Ameer Ali, J., on the other hand, thought that the adoption itself was good if it could have been validly made.

Branson, for the appellant, contended that on the evidence the authority to adopt was well proved, that no custom in the district to the effect that Ram Buksh's consent was neces-

sary was proved, and that if it were necessary there was proof of his consent.

Asquith, Q. C. and *Mayne*, for the respondent, contended that the evidence proved the reverse in reference to all three points. The Sikhur proceedings strongly supported this contention. Though they do not establish res judicata, yet they shew that Ram Buksh in his lifetime denied Chuni's authority to adopt, and that she did not venture in his lifetime to assert it. They had been erroneously excluded as inadmissible as not having been brought within the terms of s. 86 of the Indian Evidence Act. But s. 86 only prescribes one mode of proof, which was not an exclusive but an alternative mode. They were sufficiently proved to be admissible in evidence of the case put forward by each party immediately after the alleged adoption. The record was uncertified, and therefore inadmissible as substantive evidence. But thers was the primary evidence of witnesses who spoke to what took place in their presence, and those witnesses could speak to the uncertified document being a true recital, and thereby render it admissible at the least as corroborative evidence under s. 65. And according to s. 66, sub-s. 6, notice to produce the certified copy was unnecessary since the person in possession thereof was out of reach of the process of the Court.

Branson replied.

The judgment of their Lordships was delivered by

1899
Dec. 9.

LORD HOBHOUSE. The plaintiff, now appellant, is suing to recover a share of the estate of Ram Buksh, who died about the year 1884. He alleges that Chuni Bibi, who was the widow of Shib Narain, the eldest son of Ram Buksh, adopted him to be the son of her husband after his death, which took place in the year, 1877. It is not disputed that in point of form the adoption took place; but the defendants deny that Shib Narain gave his widow any authority for that purpose. Unless the plaintiff can prove that she had such authority his suit must fail. It has failed in both the Courts below, and at this bar the argument has been confined to the one question: Had the widow authority to adopt, or not?

J. C.

1899

HARANUND ROY CHETLANGIA *v.* RAM GOPAL CHETLANGIA.

The Subordinate Judge dismissed the suit on another objection, which need not now be dwelt on. In the High Court Prinsep, J. throws serious doubt on the evidence given to prove that Chuni Bibi had authority, but he does not rest his judgment finally on that ground. He considers that the parties are governed by the law of their domicil, which is in the State of Jeypore, and that in Jeypore their prevails a local custom to the effect that a widow cannot adopt without permission both from her husband and from the head of the family for the time being. Ram Buksh was the head of the family, and, so far from permitting the adoption, he strongly opposed it.

The other judge was Ameer Ali, J. He thinks that the evidence given to establish the local custom alleged by the defendants is not sufficient. He supports the decree below on the ground that the plaintiff failed to shew any authority given by Shib to Chuni Bibi. In his view the utmost that the evidence can prove in favour of the plaintiff is that Shib may have suggested to his wife to adopt a boy who would be chosen by his father Ram Buksh.

Besides the evidence of Chuni Bibi herself, Mr. Branson has laid before their Lordships the evidence of four witnesses—three of them being uncles of Chuni Bibi, and the other a cousin. It is very far from precise. With regard to three of these witnesses, named Rurmal, Bridhi, and Chota Lal, what they say rather suggests that Shib Narain was desirous that a boy should be brought to himself for adoption, preferably by his father Ram Buksh, and, failing his father, should be brought by his wife. The language ascribed to him is not that of a man conferring an important authority on his wife. The other witness, Sadasuk, speaks more definitely of permission. His evidence in chief is as follows:—

"About a month and a half after Shib Narain's coming to Calcutta, one day, at about 11 or 12 o'clock of the day, I was seated near Shib Narain, when Chuni Bibi, seeing Shib Narain vomit a large quantity of blood, began to cry. Upon this Shib Narain said, 'My father has said that he will get you a boy; if he does not get you a boy, you take a boy and preserve my

family (name), I give you permission.' Shib Narain said this to Chuni Bibi in the presence of every one."

From his cross-examination it appears that nobody else said anything except Ram Buksh, who said to Shib, "May God restore you to health; if you are not restored I will get you a boy."

This is at best a veary slender basis on which to rest an authority in the wife which the husband did not take the trouble to put into writing. Ram Buksh's remark, elicited in cross-examination, suggests, what the three other witnesses suggest, that if Shib's illness continued his father was to bring him a boy for adoption. But the witnesses are not very well agreed together. Sadasuk says that Rurmal was present, and Rurmal says that there was only one occasion on which he heard adoption talked about. These two persons, then, must be speaking of the same occasion, and Rurmal says nothing about permission. Bridhi also is said to have been present. He tells us that after Shib Narain spoke nobody said anything on the point of adoption: only Ram Buksh spoke, and what he said was that as Shib had not recovered at Calcutta he would take him to Goari. Chota Lal is said to have been present too. He speaks to several conversations in the family about adoption; and it is not easy to identify that one of which Sadasuk speaks. Some of these conversations clearly contemplate a boy being brought to Shib for adoption; and in none of them is any express permission mentioned such as Sadasuk speaks of.

These are small differences quite consistent with the truthfulness of the witnesses, who it will be remembered were speaking of conversations some twelve or fourteen years after they took place. But the question is whether, when these persons were present, Shib intended to confer, and did so express himself as to confer, a legal authority on his wife; it is of importance to know exactly what he said; and the differences between the narrators are such as to reduce to a very low value the introduction of two or three important words by one of them. Their Lordships do not refer here to the denial of such conversations by Ram Buksh's wife Bodhi and his son Ram Gopal, who are alleged to have been present. The judges of

J. C.

1899

HARANUND ROY CHETLANGIA v. RAM GOPAL CHETLANGIA.

the High Court attached importance to these denials ; but at present the sufficiency of the plaintiff's evidence is under examination.

There remains the important witness, Chuni Bibi. She must, unless she has forgotten, know the truth ; her evidence is not lacking in precision, and if believed it would fully support the plaintiff's case. She gives an account of the conversation at which Sadasuk and the others were present. It is as follows :—

"No children were born of me. I said 'Get me a son.' I also told my brother Chota Lal to tell him (my husband) to get me a son. My brother went to Babu Shib Narain and told him, 'You are now ill ; have a son brought.' Upon this Shib Narain said, 'If I recover from my illness, then I will go to my native country and bring a boy.' I then began weeping ; upon which he said , 'Why do you weep ? My father, mother, and brother are sitting here : if my father brings you a boy, that will be well ; if not, I give you permission to take a son and preserve my family.' All this talk took place in the house of Natu Ramji Ladu. This talk took place in the month of Magh of the year in which he fell ill. At the time of this talk the persons present were, Chota Lal, Sadasuk, Rurmal (my uncle), Bridhi Chand, the son of my maternal uncle Ram Coomar, my father-in-law Ram Buksh, and Latu Ram, Ram Gopal the brother of my husband, the defendant Jodhi Bibi my mother-in-law, Ramanund Thakoor, the servants of the house and other persons. All this talk took place at 11 or 12 o' clock in the day. No one gave any answer when my husband said all this. My father-in-law said, 'God may cure you of your illness, otherwise I will get a boy for you.' "

This accords with Sadasuk's account except that Chuni makes the important addition that she and Chota Lal opened the attack on Shib, and that the permission given by him was the outcome of that attack, whereas Sadasuk deposes that Chuni said nothing, and the three others do not mention any intervention by her.

In her cross-examination she admits that her husband several times put off her importunities. "He used to say, 'I shall go home after my recovery and fetch a boy,' " or "when I am

well I will talk about it." That accords with the answer which she says that Shib made to her brother Chota Lal at the outset of this interview. But she alleges that he gave formal permission on four several occasions. He used these very words, "If my father procures a boy for you, well and good; if not, I authorize you to preserve my family by takiing a son in adoption." But his words were not put into writing, and neither Chuni nor any other of the numerous people who heard these things ever once suggested that they should be put into writing.

The other incidents to which Chuni deposes need not be detailed. If believed, she proves the plaintiff's case. If she is to be treated as a witness intending to speak truth, but only liable like every one else to error, or forgetfulness, or the unconscious bias of interest, or the tendency to ascribe to a particular time and person things belonging to later times and other persons, all the evidence should be carefully weighed to see whether her story, however improbable on its surface, may not after all be the true result. But if she has made false statements on important matters of fact which it is impossible that she should not recollect, her testimony on other matters in favour of herself is attended with great suspicion.

The defendant Ram Gopal in his written statement, filed in 1889, alleges that in the year 1880 litigation took place in Jeypore regarding this adoption between Ram Buksh and Chuni, as the result of which the adoption was declared by the Court of Sikhur to be invalid. The defendants relied on this decision as res judicata in bar of the present suit, but the High Court has rightly disallowed that plea. The nature of the Jeypore suit is left too uncertain for any such use to be made of it. But the Proceedings are material to shew that Ram Buksh disputed the adoption and that Chuni supported it. The way in which she meets the defendants' allegation is to deny the litigation entirely. "Ram Buksh Babu did not bring any suit against me before the Rajah of Sikhur. I did not give any evidence at Sikhur." This she said in March, 1891.

The defendants then brought evidence to prove the Sikhur proceedings. One Bala Buksh was examined. He is an official in the Sikhur Court. He speaks of the litigation there, and

J. C.

1899

HARANUND ROY CHETLANGIA v. RAM GOPAL CHETLANGIA.

says that in his presence the evidence of Chuni Bibi was taken by the Judge Moonshi Mahomed Meeah, and that in his presence the suit was adjudicated and the order passed. He puts in a document (Exhibit X A) which he swears is a copy of Chuni's deposition, and is in the handwriting of one of the Court amla. It is indorsed, "Copy corresponding with the original," which is in the handwriting and bears the signature of Mohun Lal, the Sharistadar of the Court. He proves in the same way the deposition of Ram Buksh, whom he knew personally. Ram Buksh alleges that a widow has no power to adopt a son. Chuni does not meet the allegation by alleging authority from her husband, but complains of the interested hostility of her father-in-law, who is Shib's heir.

Bala Buksh's evidence was given in May, 1891. Evidence was taken through the months of June and July, and the cause was not heard till the end of November. The Plaintiff did not make any attempt to introduce rebutting or explanatory evidence. He has now nothing to say in answer except to suggest that the woman who was called Chuni Bibi in the Sikhur Court was somebody who personated the real Chuni Bibi, the widow. It is impossible to listen to such a suggestion of audacious fraud, unsupported by a shadow of proof, or even of allegation. Bala Buksh was cross-examined at some length, but no question was asked tending to suggest a trick of the kind which the plaintiff now puts forward. There is nothing to contradict him except Chuni's general denial of all proceedings against her at Sikhur made before he had spoken. The plaintiff does not improve his mother's position or his own by his present suggestion. Their Lordships must look on Chuni's denial as a wilful falsehood and as invalidating her testimony.

The High Court appear to have excluded all the Sikhur proceedings on the ground that they were not proved according to the mode mentioned in s. 86 of the Evidence Act. That section says that if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. It does not exclude other proof. The assertion of Bala Buksh that Ram Buksh sued Chuni, and that she gave evidence before Moonshi Meeah in his presence, is primary

evidence of those matters. His proof of the Sikhur records is secondary evidence; and by ss. 65 and 66 of the Evidence Acts secondary evidence may be given of public documents, which these are under s. 74, without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court, which is the case here. Bala Buksh shews that Chuni has told downright falsehoods, and that, in a litigation in which her authority to adopt was challenged, she did not assert it. Their Lordships wholly disbelieve the story, at best an improbable one, which she tells of her husband's permissions.

The result is to leave the plaintiff's case substantially unsupported. It is probable enough that some conversations took place between Shib Narain and his relatives concerning the adoption of a son by him; but their Lordships agree with the learned judges below in thinking that the attempt to prove an authority given by him to his wife has failed. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitor for appellant: *W. W. Box.*

Solicitors for respondents: *T. L. Wilson & Co.*

J. C.* SHAMA CHURN KUNDU. . . . . PLAINTIFF;

1899

AND

Nov. 9, 10; *Dec.* 9. KHETTROMONI DASI . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Probate.

Probate is rightly granted where the judge believes the witnesses who speak to the execution of the will and the disposing mind of the testator.

The rule in *Tyrrell* v. *Painton*, [1894] P. 151, requiring proof that the testator actually knew and approved the contents of the will, does not apply unless surrounding circumstances excite suspicion.

APPEAL from a decree of the High Court (July 29, 1895) reversing a decree of the District Court of Howrahs (June 25 1894).

The main question in this appeal was as to the title to probate of a will dated October 9, 1892, of one Modhu Soodhun Kundu, who died on that day; whether the High Court was right on the evidence in finding against its genuineness.

The judgment of the High Court, so far as material, is as follows:—

"The most recent case on the subject that has been brought to our notice is that of *Tyrrell* v. *Painton* (1), in which Lindley, L. J. remarked as follows:—

"'In *Barry* v. *Batlin* (2) Parke, B., delivering the opinion of the Judicial Committee, said: "The rules of law according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two. The first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the

**Present:*—THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

(1) [1894] P. 151. (2) (1838) 2 Moo. P. C. 480.

instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased." The same principle was laid down and acted upon in *Fulton* v *Andrew* (1) and *Brown* v. *Fisher*. (2) ..... The rule in *Barry* v. *Batlin* (3), *Fulton* v. *Andrew* (1), and *Brown* v. *Fisher* (2) is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and whenever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the decument; and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will.'

"In the present case, the question whether or not the petitioner Shama Churn Kundu benefits largely by the will depends on whether or not he is the legally adopted son of the testator, an allegation which is disputed and which has not yet been judicially decided. But putting that question aside, there are undoubtedly circumstances in this case which excite the suspicion of the Court, and, following the principle laid down in the case first cited, we think it was for the petitioner to remove that suspicion, and that because the petitioner had given formal evidence of the execution the burden was not shifted to the objector to prove mental or physical incapacity. The facts alleged in this case, that the testator died of cholera on the day on which he is said to have executed this will, after

(1) (1875) L. R. 7 H. L. 448. (2) (1890) 63 L. T. 465.
(3) 2 Moo. P. C. 480.

J. C. 1899

SHAMA CHURN KUNDU v. KHETTRO-MONI DASI.

five days' illness of that disease; that at least three days before, his life had been despaired of by his medical advisers, and that two days before, he had been carried down to the bank of the river as being in a moribund condition; that nevertheless he, on the Sunday morning, without any draft or any assistance, dictated the will set up, a lengthy and abstruse document requiring no ordinary mental effort; that the discrepancy between the Second and ninth paragraphs of the will presents a difficulty which has not been satisfactorily explained —all these circumstances, we think, do create an amount of grave suspicion which it was the duty of the petitioner to remove, and which, in our opinion, he has not succeeded in removing."

Mayne, for the appellant, contended that the evidence was sufficient to establish both the fact of execution and of the testator's disposing power. There were no circumstances of suspicion. There were two wills, one dated October 4 and the other October 9. There was very little difference between them. It was not disputed that on October 4 the testator was quite competent to make a will, and the burden was on the objector to shew that an apparently valid will executed on the 9th in substantially the same terms was a forgery. No motive is assignable for such a crime. Both wills were opposed to the interests of the appellant, who, as adopted son, would take the whole of the testator's estate in case of intestacy, subject to the widow's maintenance; whilst the wills disposed of a considerable part of the estate in legacies and for charitable and religious purposes.

C. W. Arathoon, for the respondent, contended that on the whole evidence the appellant had failed to prove either the execution of the will or that the testator was of disposing mind; and that probate was rightly refused.

Mayne was not heard in reply.

1899

Dec. 9.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The principal question in this appeal is whether probate of the will of Modhu Soodhun Kundu, who

died on October 9, 1892, ought to be granted. The appellant was the applicant for the probate, and in his petition for it presented to the District Judge on January 20, 1893, he stated that he was the adoped son of Modhu Soodhun and one of the executors mentioned in the will. He also stated that another will had been executed by Modhu Soodhun on October 4, 1892, which was revoked by the later will and was filed in Court. The application was opposed by Nistarini Dasi, the widow of Modhu Soodhun, in a petition put in on January 31, 1893, in which she denied the genuineness of the second will, refused to admit the first will, and also asserted that Shama Churn, the appellant, was not the adopied son of the deceased. On February 23 Nistarini presented a petition withdrawing her objections. Thereupon, on February 27, 1893, the respondent, who is one of the daughters of the deceased, filed a petition of objection denying the genuineness of the will, asserting that Shama Churn was not the adopted son, and that the withdrawal by Nistarini was the result of collusion, and praying to be made a party to the suit. The District Judge having refused to do this, the will was proved in common form and probate granted. The respondent appealed to the High Court, which set aside the decision of the District Judge, and remanded the matter in order that she might have an opportunity of contesting the case and that the will might be proved in solemn form. On June 25, 1894, the District Judge decided in favour of the will; he found that it was executed by Modhu Soodhun, and that he was then of sound and disposing mind. As to the adoption of Shama Churn he said:—

"I have mentioned that an allegation was made by the objector denying that Shama Churn was the adoped son of Modhu Soodhun in order to show that it was not probable the deceased should have executed such a will. Evidence was given that Shama Churn was treated by Modhu Soodhun as an adoped son, was spoken of as an adopted son by Modhu Soodhun when giving evidence. Not a particle of testimony to support the objector's allegation was given. Though two sons-in-law, a cousin, and a servant of Modhu Soodhun were examined not one of them was asked a single question whether

J. C.

1899

SHAMA CHURN KUNDU v. KHETTRO-MONI DASI.

Modhu Soodhun had adopted Shama Churn. The alleged improbability therefore fails."

The evidence in the record fully supports this opinion.

On July 29, 1895, the High Court, on the appeal of Khettromoni, reversed the decree of the District Judge, and ordered the application for probate to be dismissed.

The first witness examined in support of the will was Sri Narain Babu, the writer of it. His evidence was that Tincowri Banerji, another witness, was sitting near Modhu Soodhun and repeated what he had said although the witness could hear it himself; that at the time of the will being written out Modhu said, "There are Rs. 6,000 due to me on mortgage. Of this sum Rs. 2,000 are to be given to Kedar Nath, Prio Nath, and Bhut Nath each"; that just then someone came in and said that Bhut Nath was dead, and someone asked what was to be done with the Rs. 2,000 allotted to Bhut Nath. Modhu Soodhun said, "Let Rs. 1,000 be given to his widow and Rs. 1,000 to his mother." The witness said he made provision accordingly in the will, he forgot whether it had already been written in the will that Bhut Nath was to get Rs. 2,000, or whether this had only been mentioned by Modhu Soodhun, he could not say without looking at the will. Now, the second paragraph of the will contains a gift of Rs. 2,000 to Bhut Nath, and the ninth the gifts of Rs. 1,000 each to his mother and widow. Tincowri Banerji deposed that Sri Narain wrote the will, and he asked questions, and Modhu Soodhun "made known the terms of the will"; that he said Rs. 6,000 would be given to his three nephews: this was written, and then the document was read over, and Modhu Soodhun signed it and after him the witnesses. Someone said, "Let the will remain in Tincowri's keeping"; and so it was given to him and he took it. He went on to say that afterwards Kedar said to him, "What is written in the will is false." He said, "How is that?" Kedar, said, "My brother is dead and he has been given Rs. 2,000" (Bhut Nath having shortly before died of cholera). Tincowri said, "He did not know of your brother's death. If you wish I will inquire from Modhu Soodhun to whom he wishes that Rs. 2,000 to be given. Then three or four

of them went and said, 'Your nephew is very ill; if he dies, to whom should his money be given?' He thought for a long time, perhaps a quarter of an hour, and said, 'Let Rs. 1,000 be given to his wife and Rs. 1,000 to his mother.' Then this was inserted in the will. This was after the will had been executed. There was a space and the provision was inserted. There was no signature of the testator or the witnesses." The Dirtrict Judge, who had the will before him, was satisfied with this evidence, and accordingly excluded this addition to the will from the probate. No doubt there is a discrepancy between the evidence on this point of Sri Narain and that of Tincowri. But Sri Narain may have forgotten the exact circumstances under which the ninth paragraph was inserted, or may have been over-zealous in his desire to support the whole will. At any rate, the District Judge accepted Tincowri's version, and on that basis their Lordships cannot agree with the learned judges of the High Court, who thought that the discrepancy between the second and ninth paragraphs had not been satisfactorily explained, and that it was a circumstance to excite suspicion. Peari Mohun, one of the attesting witnesses, deposed to the execution of the will, and said that "Modhu Soodhun was all the time in his senses." Kedar Nath Kundu, a pleader, one of the nephews of the testator to whom the Rs. 6,000 were given, who was present during part of the time when, as he said, "Sri Narain was writing and Tincowri was asking Modhu and then telling Sri Narain what to write," added that "Modhu Soodhun was in his senses. He seemed to understand everything that was said to him and he was able to give replies." The District Judge says in his judgment that it was clear to him that Kedar Nath was an unwilling witness. In his evidence he appears to have been dissatisfied with what he took under the will, and, being one of the executors, was unwilling to join in the application for probate.

The case of the respondent against the will was that no will was executed. The effect of the evidence of the six witnesses called in support of it is that during the morning when the will was said to have been executed Modhu Soodhun was in an unconscious state, unable to sign a will, and that no will was

J. C.

1899

SHAMA CHURN KUNDU v. KHETTRO-MONI DASI.

made. The District Judge who saw the witnesses has found that the will was executed by the deceased, and that he was of sound disposing mind when he executed it.

The judgment of the High Court reversing this decision appears in the conclusion of it to be founded upon what is said by Lindley, L.J. in *Tyrrell* v. *Painton* (1), that whenever circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document. In this case the suspicion, if there was one, would be that on the morning when the will was said to have been made the deceased was in an unconscious state and unable either to sign the will or to understand what he was doing; that is, that the witnesses in support of the will were not telling the truth. If they were, their Lordships do not see anything to excite suspicion. The question was simply which set of witnesses should be believed. The District Judge saw them, and the remarks in his judgment shew that he observed their demeanour. The High Court had not that advantage. In their Lordships' opinion the probate was rightly granted, and the decree for it should not have been reversed, It is not necessary to decide the other questions raised in the appellant's case. Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, and order the appeal to it to be dismissed with costs. The respondent will pay the costs of this appeal.

Solicitors for appellant: *Barrow & Rogers.*

Solicitors for respondent: *T. L. Wilson & Co.*

(1) [1894] P. 151.

MAHOMED MEERA RAVUTHAR AND OTHERS . . . . . } APPELLANTS :

AND

SAVVASI VIJAYA RAGHUNADHA GOPALAR . . . . . } RESPONDENT.

J. C.*

1899

Nov. 17, 22 ; *Dec.* 9.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Petition to set aside Execution Sale—Only Grounds stated can be relied upon—Civil Procedure Code, s. 311*—Position of Decree-holder with Leave to Bid —Agreement not to Bid.*

A decree-holder who obtains leave to bid is in the same position as any other purchaser, subject to no exceptional restrictions.

Woopendro Nath Sircar v. *Brojendronath Mundul*, (1881) Ind. L. R. 7 Cal. 346, considered.

An agreement between persons not to bid is no ground for setting aside a sale in execution under s. 311 of the Code of Civil Procedure.

Where the petition to set aside a sale did not allege, as one of its grounds, that the decree-holder had improperly obtained leave to bid by omitting to mention such agreement, and no issue was raised or investigation made upon the matter :—

Held, that the High Conrt in appeal ought not to have set aside the sale on that ground.

APPEAL from an order of the High Court (April 1, 1896) affirming an order of the Subordinate Judge of Tanjore (March 15, 1895).

This was a petition against the appellants' predecessor, Jainilabdin Ravuthar, filed by the respondent the zemindar of Singavanam, at the end of his minority, to cancel the sale of eight of his villages, which had taken place in execution of two decrees passed against his estate. These decrees had been passed and enforced while the estate was under the management of the Court of Wards. The petition alleged that the property was worth Rs.2,00,000, and was sold for about Rs.78,000, and specified nine grounds on which the sale should be set aside, of which the last was : " As Jainilabdin and the zemindar

* *Present* : LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

J. C.

1899

MAHOMED MEERA RAVUTHAR v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.

of Pappanad had entered into an agreement and prevented those that came to bid in the auction from making higher bids, the said properties were sold in the auction for a very low amount."

Upon this ground the Subordinate Judge arrived at the following findings of fact: (1) That the agreement was made for the benefit of the Pappanad zemindar and the petitioner, the former intending to sell the property back to the latter, when he should be in a position to repurchase it; (2) that the Pappanad zemindar combined with Jainilabdin to dissuade persons from bidding, and did in fact dissuade them; (3) that the purchaser paid Rs.83,000, a price less than the real value, the diminution being due to the said agreement having been made and acted on.

He accordingly set aside the sale on condition that the petitioners paid the Rs.83,000 within six months, the interest being set off against the profits.

The High Court in appeal accepted these findings and confirmed the order. The reasons which they gave are these. They considered that there was no irregularity in the sale within the meaning of s. 311, and that the dissuading of intending purchasers was not a fraud. "It is not suggested that there was any intimidation practised, or any obstruction offered to possible bidders, nor again is it said that any misrepresentations were made at the auction to deter people from bidding. Probably the zemindar is a man of influence in the neighbourhood, and there was some sympathy for the family of the judgment debtor."

On the other hand, the Court considered that "the omission on the appellant's part to disclose the agreement to the Court amounted to a fraud upon the Court, entitling the judgment debtor to say that, in point of law, no leave to bid was granted. The case is one in which there was a duty incumbent on the appellant (Jainilabdin) to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure it is impossible for the Court to exercise its discretion. The withholding of information is, in our judgment, no less a ground for cancelling

a sale than actual misrepresentation on the part of the appellant who becomes the purchaser."

As to the right of the minor to make the application to set aside the sale, the Court observed: "Obviously, a judgment debtor who being of full age had consented to the arrangement could not afterwards have challenged the sale; but the judgment debtor was a minor, and he is entitled to challenge the sale if it is shewn that his interests were not duly protected by those whose duty it was to have regard to them. If, independently of any decree, the minor's property had been put up to auction and bought by the mortgagee under an arrangement similar to that actually made, there can be no doubt that on his coming of age the mortgagor would have been entitled to repudiate the transaction. Had the guardians of the minor done their duty by him, a reserve price would probably have been fixed on the property, the application of the decree-holder for leave to bid would have been resisted, and they certainly would not have acquiesced in a plan so perilous to the minor's interest as that which with their approval was conceived and carried out. For these reasons we agree that the sale must be set aside."

The order of the Lower Court was modified as follows: "Unless the respondent pays into court the sum of Rs. 83,000 within one week from the reopening of the sub-court, the eight villages must be advertised again for sale to the highest bidder at the upset price of Rs. 83,000. The effect of this will be that, if there is no higher bidder, the appellant will be held to his bargain. As the appellant has been in possession lawfully, he is entitled to the mesne profits in lieu of interest up to the date of payment, or that of the fresh sale, if any. There will be no order against the appellant with regard to mesne profits, nor any in his favour as to interest. Each party to bear his own costs of the appeal."

Mayne, for the appellants, the representatives of Jainilabdin, the purchaser, contended that a decree-holder who obtains leave to bid is in exactly the same position as any other purchaser. A sale to him cannot be set aside under s. 311 except

J. C.

1899

MAHOMED MEERA RAVUTHAR v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.

for material irregularity such as would avail against any other purchaser. *Tassaduk Rasul Khan* v. *Ahmad Husain* (1) is the last case on the subject of irregularity as distinguished from nullity. In regard to the point taken by the High Court, there was in the first place no evidence that the agreement relied upon was entered into before leave to bid was applied for; in the second place, if it had been made previously thereto, there was no obligation on Jainilabdin to disclose it to the Court, and certainly his failure to do so could not entitle the judgment debtor to treat the leave granted as a mere nullity and repudiate the transaction on that ground. Moreover, that ground was not taken in the petition, and could not have been taken under s. 311. The ground was taken for the first time by the High Court in appeal, without any issue or evidence having been directed to that point in the Court below. [LORD DAVEY referred to *Coaks* v. *Boswell* (2)]. That case shews that as soon as the decree-holder got leave to bid he was in the same position as any other purchaser: see Civil Procedure Code, s. 294. Neither the sale nor the order granting leave to bid can be treated as void ab initio. The sale had been confirmed by order of Court, and could only be set aside, if at all, by regular suit, in which the fraud relied upon by the High Court should have been alleged and proved, and shewn to have been of such nature as to justify the cancelment of the sale. There was, moreover, no evidence on which to impute neglect of duty to the respondent's guardians during his minority.

Branson, for the respondent, contended that the judgment of the High Court was right. The appellant's failure, when applying for leave to bid, to disclose the agreement which the evidence shewed was then existing between himself and the Pappanad zemindar, was a fraud on the Court. The result of the fraud was that the order was vitiated by it, and was as if it had never been granted. It was void ab initio. Even if it were not, leave to bid casts upon the decree-holder the duty to exercise the most scrupulous fairness in exercising it. That duty is rightly enforced by the High Court: see *Woopendro*

(1) (1893) L. R. 20 Ind. Ap. 176. (2) (1886) 11 App. Cas 232.

Nath Sircar v. Brojendronath Mundul (1) ; *Doorga Singh* v. *Sheo Pershad Singh* (2) ; *Sheonath Doss* v. *Janki Prosad Singh* (3). The objection being fatal to the purchase, although it was not taken in the lower Court, was nevertheless competently taken before or by the High Court : see *Nawab Ahsanulla Khan* v. *Hurri Churn Mozoomdar* (4).

Mayne, replied.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The suit in which this Appeal is presented was commenced in the year 1882. The appellants whose names are now on the record were substituted for the original appellant, the plaintiff in the suit and appellant below, on his death ; but there has been no change of interest, and it will be convenient to use the name of appellant for all. The appellant sought to enforce a charge on the zemindari estate of Singavanam against the then owners, the present respondent who was a minor, and his father, who has since died. Another suit was brought by another person for the same purpose in the year 1883. Both plaintiffs obtained decrees. When the respondent's father died the estate passed into the management of the Court of Wards. In March, 1891, the appellant obtained an order in execution of his decree for sale of eight villages, parts of the estate. They were sold, apparently in execution of both decrees, in the month of April, 1891. There was then due in the suit of 1882 upwards of Rs. 60,000, and in the suit of 1883 upwards of Rs. 17,000. The appellant who held the decree in the suit of 1882 obtained leave to bid at the sale, and he was declared to be the purchaser. He took possession, and was in possession when the present proceedings commenced.

In April, 1894, the respondent came of age, and the Court of Wards handed over the Singavanam estate to him. On May 15, 1894, he presented a petition, under s. 311 of the Civil Procedure Code, for the purpose of annulling the sale of 1891.

(1) Ind. L. R. 7 Calc. 346.
(2) (1889) Ind. L. R. 16 Calc. 194, 200.
(3) (1888) Ind. L. R. 16 Calc. 132.
(4) (1892) L.R. 19 Ind. Ap. 191.

J. C.

1899

MAHOMED MEERA RAVUTHAR *v.* SAVVASI VIJAYA RAGHUNADHA GOPALAR.

That is the section which empowers persons whose property has been sold to set the sale aside on the ground of material irregularity in publishing or conducting it. In his petition the respondent alleged a number of irregularities, but as to all except one the Courts below have found, either that the allegation was erroneous, or that the irregularity had not caused substantial injury.

The remaining charge was thus stated :—

"That on the date of sale an agreement was entered into between Pappanad zemindar and Jainilabdin in consequence of which intending purchasers were dissuaded from bidding at auction."

The Subordinate Judge treats this charge as raising the following points for decision :—

"(1) Whether there was any agreement between the Pappanad zemindar and the counter-petitioner on the date of sale, 6th April, 1891, and (2) Whether in consequence thereof, intending purchasers were prevented from bidding at auction."

There was clearly a written agreement between the Pappanad zemindar and the appellant, dated April 6, 1891, by which the appellant agreed that if he should purchase the villages he would resell them to Pappanad for Rs.85,000. The Subordinate Judge found that there was a further verbal agreement between the two to the effect that they would dissuade persons from bidding, and that some persons were so dissuaded. The villages were knocked down to the appellant at the price of Rs. 78,000, and the Subordinate Judge found that with some outgoings he paid Rs.83,000.

Of the value of the property he says, "The highest value may be between 1¼ and 1½ lac roughly taken." He arrived at the conclusion that owing to the dissuasion of bidders the villages were undersold, causing substantial injury to the respondent, and that he was bound to set aside the sale under ss. 311, 312 of the Code.

The Subordinate Judge proceeds on the ground that when a decree-holder obtains leave to bid, he is placed in a position of exceptional delicacy, and becomes subject to restrictions not

applying to other people. He quotes a passage from a judgment of the High Court of Calcutta (*Woopendro Nath Sircar* v. *Brojendronath Mundul* (1) :—

"We think that when liberty is given to a decree-holder to bid at the sale of the judgment debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others from purchasing at the sale, that, of itself, is a sufficient ground why the purchase should be set aside."

With the decision of that case no fault is to be found. The decree-holder there was acting in concert with, and partially for the benefit of, one who stood in a fiduciary relation to the infant debtor; and there was clearly a conflict between their duty and their interest. The passage extracted from the judgment was not necessary for the decision, and in their Lordships' opinion it is too sweeping in its terms. In the 16th Indian Appeals, p. 114, it is laid down that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any other purchaser. All purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders. But nothing of that sort is alleged in the present case.

On appeal the High Court were in substantial agreement with the Subordinate Judge on the facts of the case. But they do not accept his conclusions of law. They say :—

"The order is made under s. 311 of the Code, and it is based on the ground of irregularity in the conduct of the sale. In our opinion there has been no irregularity within the meaning of the section. No charge is made against the person conducting the sale. The charge is made against the respondent and those who acted in concert with him, and it amounts to this : that they acted in such a way as to prevent the best price being obtained and thus caused loss to the judgment debtor. So far as this particular charge is concerned we are further of opinion that it does not amount to a charge of fraud. Putting aside for the present the fact that the purchaser was the decree-holder, and confining our attention only to the agreement made

(1) Ind. L. R. 7 Calc. 346.

J. C.

1899

MAHOMED MEERA RAVUTHAR v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.

before, and the conduct of the parties at, the sale, we do not think that any fraud was established."

They then go on to shew by reference to English authorities that an agreement between persons not to bid is no ground for setting aside the sale, or even for opening the biddings. And they conclude thus :—

"The means by which competition was discouraged at the auction were clearly of an innocent character. In employing them, as in making the agreement with the zemindar the purchaser did not go beyond the limits of what he was entitled to do in order to make a good bargain."

The learned judges do not comment on the dictum of the Calcutta High Court, but it is clear that their view of the rule of law is in accord with that which has been pronounced by this Board.

Their Lordships agree in these conclusions. The logical result of them is that the High Court, finding that the matters alleged by the respondent did not amount to irregularity within the meaning of s. 311, under which the petition was presented, and were of innocent character so as not to afford ground for setting aside the sale, should have dismissed the petition.

They go on, however, to take a point which, so far as the record shews and for anything that counsel can point out to the contrary, is raised for the first time in their judgment. It is certainly not mentioned in the respondent's petition, and certainly was not in the mind of the Subordinate Judge as one of the issues to be tried. The respondent alleged in his petition that the appellant had never obtained leave to bid at all—an assertion which was found to be erroneous. The appellant was not confronted with the assertion that, having obtained leave to bid, he had done so by committing a fraud upon the Court.

The learned Judges held that, inasmuch as the appellant got leave to bid, his omission "to disclose the agreement to the Court amounted to a fraud on the Court, entitling the judgment debtor to say that in point of law no leave to bid was granted." They then lay down that "there was a duty incumbent on the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his

being allowed to bid. Without such disclosure it is impossible for the Court to exercise its discretion. The withholding of information is in our judgment no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser." On these grounds they set aside the sale.

It seems to their Lordships that the positions taken by the learned judges raise serious questions relating to the procedure of the Courts. It is very important that one who seeks to set aside a purchase completed under the sanction of the Court should state the grounds on which he claims to impeach it, and should not be allowed after trial of the case to rely on other grounds which have not been the subject of trial or adjudication in the Court which takes the evidence. It is not easy to formulate a rule which will fit every case, but the principle is clear enough, that a party shall not be condemned in Court on allegations which turn on evidence, and which he has not been led to rebut by evidence. Whether fresh issues may be introduced, and how, without injustice, is a question of detail in each case; but their Lordships are led to think that in this case the essential principle has not been kept in sight.

It has been shewn that the Subordinate Judge's view of the mortgagee's position is the view expressed in the dictum of the Calcutta High Court above quoted, and it is one which does not require tha petitioner to allege or the Court to decide that leave was improperly obtained. Therefore no attention was paid to that question, which is wholly distinct from the questions of irregularity, and from the question whether the conduct of the appellant at the time of sale had the effect of lowering the purchase-money.

The High Court, however, saw that the Subordinate Judge was wrong in law, and that the sale could not be impeached without getting rid of the leave to bid. They did not remand the case for a new issue, but they decided for themselves that the order was obtained by a fraud upon the Court, and therefore the position of the parties was the same as if no leave had been granted at all. The only foundation assigned for this decision, that the appellant had committed a fraud not laid to his charge,

J. C.

1899

MOHOMED MEERA RAVUTHAR v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.

is a passage to this effect: "It is admitted that nothing was said about it" (viz, the agreement) "when application for leave was granted. That the agreement was in existence at that time there is no manner of doubt."

Their Lordships must say that it is very embarrassing to find the case decided in appeal on a new charge which, considered in its bearing in law or on character, is of greater gravity and importance than all the other charges put together, without any reduction to writing of the terms of the admission, which is used to support it, or any record of the mode in which it was made, or any reason assigned why a new issue should not be tried; indeed, without any recognition that it is a new issue. As the statement stands it is uncertain what is meant by "the agreement."

There are two agreements—one written and one verbal. The written one was with a nominee of Pappanad, who says that it was for the benefit of the respondent, his brother-in-law. What that means is not clear, and though the agreement was reaffirmed six months after the sale, it has not been acted on by either party. Its effect would, as the High Court observes, be to take away from the appellant himself any motive for bidding above Rs. 85,000 on his own behalf; but the creditor as such never has any motive for bidding higher than to secure his own debt, which is equally for the advantage of himself and his debtor. Why such an agreement should prohibit any other bidder in any but some indirect way it is difficult to see.

The verbal agreement to dissuade bidders is another matter. But if that is the agreement of which the High Court is speaking, it is impossible to say that there is no manner of doubt that it was in existence when the appellant's application was made, or even when the leave was given. On the contrary, the evidence relating to this agreement, which indeed is extremely vague on every point, does not state when it was made. Consistently with the record it may have been made at any time during the six days over which the sale extended. There are no findings as to the material dates, and they cannot be collected from the evidence in the record. There is no reason why there should be such findings or evidence, because, though

J. C.

1899

MAHOMED MEERA RAVUTHAR v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.

very material to the new issue, they are not material to the issues raised by the petition.

The learned judges below lay down that "there was a duty incumbent on the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid." There is nothing to shew that the position of this appellant differed from that of other judgment creditors, and taking the remark as a general one it requires qualification. In *Coaks* v. *Boswell* (1) the Court of Appeal stated the rule to be that a person whose position precluded him from purchasing (it was a solicitor in that case) must when he applied for leave to purchase either abstain from laying any information before the Court, or must lay before it all the material information he possesses. That rule is considerably narrower than the rule laid down by the High Court, and yet it seemed to the House of Lords to be too broadly stated. Lord Selborne held that it is not the duty of the applicant to give information which is not requested, and concerning which there is no implied representation positive or negative, direct or indirect, in what is actually stated. Lord Fitz Gerald states the rule with nearly equal caution, though in an affirmative instead of a negative form: "If he professes to give the Court information on any particular subject with a view to guide its discretion and obtain its approval of the proposed sale, he is bound to lay before the Court all the material information he possesses on that particular subject."

In order to judge whether an applicant has misled the Court, all material circumstances attending the application should be known. It is material to know whether the application was made ex parte or on notice. Their Lordships attach great importance to the obligation which rests on all persons seeking ex parte orders to be thoroughly open with the Court. But was this order made ex parte? When this question was asked during the argument no certain answer could be given. Mr. Branson thouht it a matter of general practice to make such orders ex parte, and Mr. Mayne thought otherwise. From the observations of the High Court their Lordships infer that

(1) 11 App. Cas. 232.

J. C.

1899

MAHOMED MEERA RAVUTHAR v. SAVVASI VIJAYA RAGHUNADHA GOPALAR.

the order was made on notice to and with the approval of the Court of Wards, which, if true, is a very important circumstance.

Had the issue of fraud been raised, inquiry must have been made of the officer of the Court of Wards as to the communications made to him, and as to the line which he took about the sale in the Civil Court. He may have known of the written agreement with Pappanad. On what grounds did the guardians rest their approval of the plan of which the High Court speak, and in what form was it given? All these matters are left in the dark so completely that we cannot be certain even whether the order was or was not made ex parte.

Another case was referred to: *Sheonath Doss* v. *Janki Prosad Singh and Others* (1). It has only an indirect bearing on the obligations of a decree-holder who asks leave to bid; but it opened another discussion on procedure in an impartant matter. In this case the Calcutta High Court dwelt on the necessity of great caution in grantiug leave to bid; indeed, it laid down such conditions as would make the granting of leave a very rare thing, instead of being, as their Lordships believe it is, a very common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are applicable to a system under which the decree-holder has the conduct of the sale.

Doubtless the conduct of the sale gives opportunities for influencing its course one way or another, which do not follow on the mere leave to bid. The Civil Procedure Code clearly throws on the Court the whole responsibility of conducting the sale. From the observations of the High Court their Lordships infer that this sale was conducted as the law directs; but nothing express is said about it, and the respondent's counsel contended that the ordinary practice is to allow the decree-holder to conduct the sale, and suggested it as probable that in this instance the appellant conducted the sale.

It is always unsatisfactory to reverse a decree for the reason that the ground on which it rests was not that on which the parties came to issue. But it is obvious that great injustice

(1) Ind. L. R. 16 Calc. 132.

may be done by shifting the issue in the Court of Appeal, and so deciding without due investigation. There has in this case been a departure from recognised principle, which is calculated to lead to injustice; and though their Lordships cannot say, the case not being tried, that it has led to injustice, they are far from clear that it has not. A controversy raised about the propriety of procedings during a sale has been treated as if it were a question whether a fraud was committed on the Court prior to the sale. For the decision of that question it is important to know every incident bearing on the application to the Court: the precise dates of the application, of the order, and of the agreements alleged to have been concealed; the proceedings in Court; the parties present; the state of their knowledge, and so forth. None of these things has been sifted, nor, so far as appears, has the appellant had any reason for sifting them till the High Court came to decide the case in appeal. Their judgment is founded on an admission very vaguely stated and on a view of the obligations attaching generally to applicants for leave to bid which are unduely onerous, at least to decree-holders at arms' length with their debtors. It is of course conceivable that if all relevant matters were ascertained the present appellant would be found to have fallen short of his duty; but in the present state of the case all their Lordships can say is that the respondent has neither alleged nor proved the fraud on which alone he can sustain the present order. Their Lordships will humbly advise Her Majesty to discharge the order and to dismiss the petition with costs in both Courts. The respondent must pay the costs of the appeal.

Solicitors for appellants: *Lawford, Waterhouse & Lawford.*

Solicitor for respondent: *R. T. Tasker.*

J. C.* AH SHAIN SHOKE AND OTHERS. . . . DEFENDANTS,

1899

AND

Nov. 17; *Dec.* 9 MOOTHIA CHETTY AND OTHERS . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF THE RECORDER AT RANGOON.

Action on alleged Contract—Bought and Sold Notes—Variance.

In an action for not taking delivery of paddy, it appeared that the bought note signed by the appellants contained the term—expressed in Chinese, which the respondents did not understand—that there should be no yellow grains, whilst the sold note signed by the respondents did not contain it :—

Held, that if the respondents did not assent to this term there was no contract ; if they did, the paddy tendered was not on the evidence in accordance with the term. In either view the action must be dismissed.

APPEAL from a decree of the Recorder's Court (September 16, 1898) in favour of the Respondents' suit for damages for breach of an alleged contract.

The contract was evidenced by bought and sold notes. The respondents signed the sold notes to supply appellants with from 35,000 to 40,000 baskets of paddy of usual quality ; the appellants when they signed the bought notes added a term to both notes to the effect that there shouldbe no yellow or wet grains.

The Recorder held that the insertion by the appellants was an attempt to alter a contract already concluded. He said, " The sole point is, did the respondents consent to the insertion ?" He threw the burden of proof on the appellants, and found that they had failed to meet it. In effect, he found that there was a contract, but that it did not contain the added term.

Phillips, for the appellants, contended that there was no proof of any contract at all without the inserted clause. The appellants never agreed to the contract alleged by the respondents ;whilst the respondents did agree to the contract alleged by the appellants, for they the respondents never objected to

* *Present* : LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

the term which was inserted in the bought note retained by them. The terms on which the broker was authorized to contract were those embodied in the notes as altered and signed by the appellants, and those terms were accepted by the respondents. There was a contract, but the paddy tendered was not in pursuance thereof, for it contained wet and yellow grains.

Haldane, Q.C., *McCarthy*, and *Giles*, for the respondents, contended that the Recorder was right. The completed agreement between the parties was expressed in the sold note signed by the respondents. The additional term to the contract sought to be imposed subsequently by the appellants was never agreed to by the respondents, and never came to their knowledge till after the appellants' breach. They were not guilty of negligence in not examining the bought note when it was returned to them by the broker. It is contrary to trade custom to alter such notes after one party has signed, and the alteration was never brought to their notice.

Counsel for the appellants was not heard in reply.

The judgment of their Lordships was delivered by

1899
Dec. 9.

SIR RICHARD COUCH. The suit in this case was brought by the respondents against the appellants for a breach of contract in not taking delivery of a large quantity of paddy sold by the former to the latter on or about September 6, 1897. The defendants had taken delivery of part of the paddy sold, and paid Rs. 14,664 on account of it, being Rs. 432 less than the amount of the contract price for it, and the plaintiffs claim this sum and Rs. 17,448 15*a.* 9*p.* as damages for the not taking delivery of the remainder. The defence was that the contract was for the purchase of 35,000 to 40,000 baskets of paddy on the terms and conditions set out in the written contract embodied in bought and sold notes, that the quality of part of the paddy which was taken delivery of was objected to and a reduction of Rs. 8 per 100 baskets was agreed to by the respondents, and the quality of the remainder of the paddy which the appellants refused to take delivery of was not according to the contract. The suit was tried before the

J. C.

1899

AH SHAIN SHOKE v. MOOTHIA CHETTY.

Recorder of Rangoon, and the following facts were proved at the trial. The appellants are a firm of Chinamen trading in Rangoon under the name of Shain Leong, and the respondents are traders and money-lenders carrying on business there. The contract was made through a broker named Oothooman, the price after some negotiation being fixed at Rs. 138 per 100 baskets. He had bought and sold notes written by one Moideen, which were in English and were copied from another contract altering the names. The sold note was signed by Ramanathan and Patail, two of the respondents, and was then taken away by Oothooman. He and Moideen then went to the defendants' house and gave both the bought and sold notes to Ah Shain Shoke who called a clerk, Lok Shain, and asked him to read the contract. After he had read it Ah Shain Shoke refused to sign it unless it was inserted that yellow and wet grain would not be taken. He wrote on the bought and sold notes in Chinese and signed the bought note, and gave it to Oothooman, who went with Moideen to Patail's house and gave it to him. It had on it in Chinese, "Yellow rice will not be accepted; will not accept if it is wet." The respondents did not know Chinese, and none of them noticed the writing till after the dispute. The paddy contained a sufficient quantity of yellow grains to make it not in accordance with the Chinese addition to the bought and sold notes, and Rs. 8 per 100 baskets was a reasonable reduction to be made in the contract price on account of the yellow grains. Moothia Chetty, one of respondents, said in his evidence he did not consider the contract as concluded until bought and sold notes were signed. He was right in this. They were the only evidence of the contract. As signed by the appellants the bought notes contained the term that there should be no yellow grains. If the respondents did not assent to this and insisted on the sold note signed by them being without that term, the notes would not agree and a contract would not be proved by them. If the respondents did assent, they did not perform their part of the contract by offering paddy which was free from yellow grains. In either case the decree appealed from which gives to them the whole of their claim is erroneous, and their Lordships will

humbly advise Her Majesty to reverse it and order the suit to be dismissed with costs. The respondents will pay the costs of the appeal.

Solicitors for appellants : *Sanderson, Adkin & Lee.*

Solicitors for respondents : *A. H. Arnould & Son.*

J. C.
1899
AH SHAIN SHOKE *v.* MOOTHIA CHETTY.

TARA LAL SINGH . . . . . APPELLANT.

AND

SAROBUR SINGH (PLAINTIFF) AND OTHERS. RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

J. C.*
1899
Nov. 14, 15, *Dec.* 9.

Execution—Attachment—Sale.

Where an execution sale was ordered and made in execution of three decrees, two of them against one brother alone and the third against three brothers jointly, and separate attachments and separate sale proclamations were made in all three cases :—

Held, that the sale operated a transfer of all three brothers' interest in the attached lands.

APPEAL from a decree of the High Court (March 2, 1896) reversing a decree of the Subordinate Judge of Manbhoom (Sept. 30, 1893) which had dismissed the suit of the respondent Sarobur Singh.

Gadadhur, now represented by Sarobur, sued under the circumstances stated in their Lordships' judgment in reference to the decree against him passed in suit No. 107 and executed in case No. 224. He alleged (1) that the decree had been obtained *ex parte* and subsequently struck off; (2) that before it was set aside the Rajah had in execution thereof procured the sale by the Court of the villages now in suit and had purchased the same; (3) that the sale was therefore void. The appellant and his brother pleaded (1) limitation ; (2) that the property had been sold not merely in case No. 224, but also in two other cases, 225 and 226, in which the decrees had not been set aside.

* *Present* : LORD MORRIS, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C.

1899

TARA LAL SINGH *v.* SAROBUR SINGH.

The Subordinate Judge dismissed the suit. He held that the sale was invalid as against Gadadhur, but that the suit was barred by limitation, Gadadhur being bound to sue under the Limitation Act of 1877, Sched. II., art. 12, within one year from the dismissal of his application to the Board of Revenue to set aside the sale.

The High Court held that the decree which was enforced was the decree which was passed in suit No. 107, which had been set aside, and that accordingly Gadadhur's interest did not pass.

The High Court accordingly declared that Gadadhur was entitled to his one-third share of the said villages.

Mayne and *Branson*, for the appellant, contended that the High Court ought to have held that the sale of July 15, 1878, was held in execution of all three decrees and in all three execution cases, and that Gadadhur was shewn by the evidence to have been fully cognizant of this. The sale was a valid one under Bengal Act VIII of 1865. Gadadhur's interest had been attached prior to the sale. His interest passed to the purchaser at such sale, which was valid and operative to that effect.

1899

The respondents did not appear.

Dec. 9.

The judgment of their Lordships was delivered by

LORD DAVEY. The suit out of which this appeal arises was one for possession of one-third share of certain mouzahs, the entirety of which had been sold by auction in certain execution proceedings in the year 1878. A similar suit was commenced by another claimant, and the two suits were heard together. The validity and effect of these execution proceedings is the matter in dispute. The following are the material facts.

In and prior to the year 1870 three brothers named Chhatradhari, Gadadhur, and Sarobur were in joint possession of the mouzahs in question on a jaghir tenure under the late Rajah Nilmoni (the predecessor in title of the present appellant). The Rajah obtained three decrees in the Court of the Assistant Commissioner of Purulia; (1) No. 136 against Chhatradhari

alone for the rent of the mouzahs for the Fasli years 1293—1295; (2) No. 107 against Chattradhari and Gadadhur (misdescribed as Gungadhur) for the rent for the years 1297-1299; and (3) No. 1334 against all three brothers (Sarobur being misdescribed as Surleswar) for the rent for the years 1280-1282. All these decrees were obtained *ex parte*, the defendants in the several actions not appearing. On June 3, 1879, and after execution proceedings, Gadadhur obtained an order for restitution of suit No. 107 to the judges' list for trial, and it was ultimately struck out so far as he was concerned for default of the plaintiff. The decrees in No. 136 and No. 107 were therefore in effect against Chhatradhari alone, and that in No. 1344 against three brothers (subject to any question as to the misdescription of Sarobur).

The decree-holder applied for execution of these three decrees. The execution proceedings under No. 136 were numbered 225. Those under No. 107 wer numbered 224, and those under No. 1334 were numbered 226. The decree-holder appears for some reason to have wished to take out execution against Chhatradhari alone. Some objection appears to have been made (though the record does not contain the document raising the objection or shew by whom it was made), and the following orders were passed by the Deputy Commissioner :—

"Rajah of Pachete . . . . *Decree-holder*,

versus

"Chhatradhari Singh and Others . *Debtors.*"

"I am of opinion that the objection, though in point of abstract justice of no real importance, must in point of law be allowed."

"(*a*) In each case when the application has not been made setting forth the names of actual parties the application must be amended.

"(*b*) A separate notice of sale for each decree must be made. This notice shall be hung up in (1.) Mr. Renney's court, (2) in the Collector's court, (3) in the Subordinate Judge's court, (4) in the court of the Judicial Commissioner, to whom a

J. C.

1899

TARA LAL SINGH v. SAROBUR SINGH.

memo. in English will be sent, (5) in one of the villages on the land, to wit, Assenhole, (6) in the nearest village to the land.

"(*c*) The notice shall specify the name of the mouzah and pergunnah in which the under-tunure is situated, the rent payable—viz., Rs. 671 per annum—and the entire amount (correctly calculated and, if both are agreeable, admitted by signature of both parties) recoverable under the decree under which the under-tenure is to be sold.

"(*d*) In each copy of the notice (the copies for Mr. Renny's court and the Collector's court will be hung up not later than the 20th June) it shall be said that the sale shall take place on the 15th day of July, 1878, at noon, in the Cutchery of the Collector.

"B. W. Morton, D.C.

"The 15ih June, 1878."

"As the decree-holder does not choose to take out execution against all the persons against whom he obtained decrees, and only against Chhatradhari Singh, it does not appear to me that he is bound to take out execution against all. He says Chhatradhari Singh is the only man who has any right. Decree-holder knows his own business best. In the notice the claims of all parties will be given, as the law directs this to be done. If the other men are real tenure-holders they may protest. I direct that they be served personally with notice of the proposed sale of the under-tenure.

B. W. Morton, D.C.

"The 21st June, 1878."

It appears clearly from the language of these orders that the Deputy Commissioner had the several decrees before him, and that his order applied to each decree, and it must, their Lordships think, be assumed that his orders were complied with and the proper notices were given to the several defendants in suit No. 1334 as well as in the other suit, so as to bind the interests of all these defendants.

The sale took place on July 15, 1878, and the decree-holder was declared the highest bidder and purchaser of the villages at the price of Rs. 7,000. It is plain from the rubokari of the Court

of the Collector confirming the sale that it was made in execution cases, Nos. 224, 225 and 226. It is headed with those numbers. It mentions attachment was made separately of the said lands in the several cases numbered separately; that separate sale proclamations were published, and that the three records were put up on the day fixed for the sale. There can, therefore, be no doubt that the sale was made in suit 1344, and there can be no doubt that the proper notices were given and proclamations made to bind all the defendants in that suit. There is no allegation or proof to the contrary in the present suits.

A sale certificate was issued to the purchaser on October 28, 1878. Before the granting of this certificate, the three brothers, on August 6, 1878, filed a memorandum of objection for the purpose of having the sale set aside, and their first two grounds of objection are that the sale was made in three separate execution cases, in which they were the judgment-debtors separately, each of them not being the judgment-debtor in each of these decrees. They also made objections to the regularity of the proceedings on the sale, and raised certain questions as to the disposal of the purchase-money.

The appeal of the judgment-debtors was dismissed by the Commissioner, and his judgment appears to have been confirmed by the Board of Revenue. Their Lordships do not think that this judgment can be regarded as res judicata in the present suits if, as the High Court has held, there was no sale of anything but Chhatradhari's interest; but the proceedings are important as shewing that the three brothers understood that the sale was in all three decrees, and that they were all judgment-debtors, and the property had been sold in execution of at least one judgment against them all. They also shew that Sarobur recognised himself as the person sued, notwithstanding the mistake in his name on the record of 1344.

The present suit was commenced on June 2, 1890, and in his plaint the plaintiff alleged that the property was sold under decree No. 107, and the execution case 224 (without mentioning the other decrees and execution cases), and that inasmuch as that decree had been set aside, the sale on execution of it was

J. C.

1899

TARA LAL SINGH v. SAROBUR SINGH

void as against him. Their Lordships have already intimated the grounds upon which this contention cannot be maintained. The High Court have, however, held that, having deliberately elected to execute the decrees against Chhatradhari alone, and having, after the sale, chosen to have the sale treated as made in execution 224, the decree-holder cannot be allowed to treat the proceedings differently, and support it as a sale of the interests of all three brothers. Their Lordships cannot accede to this reasoning. The learned judges do not seem to have thought that if the sale took place, and is to be treated as having taken place in execution No. 226, the sale would not be valid, but they seem to have thought that the decree-holder and the present appellant are in some way estopped from treating the sale as made under execution No. 226. It is not, however, a question of estoppel, but of fact, and on this point their Lordships need not repeat what they have said. There can be no estoppel when the truth of the matter appears, as it does in the present case, on the face of the proceedings. And it is plain from their memorandum of objections that Gadadhur and Sarobur were not deceived as to the facts, or prevented by any misstatement of the Rajah from asserting any rights they may have conceived themselves to possess. On the whole, their Lordships cannot find on this record that either in form or substance any injustice was done to Gadadhur or Sarobur, and they hold that the sale passed the entirety of the property.

They will, therefore, humbly advise Her Majesty that the order appealed from be reversed, and the appeal to the High Court be dismissed, the parties bearing their own costs as in the First Court. As this is a pauper case, there will be no costs of the appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

REWA PRASAD SUKAL . . . . . DEFENDANT;

AND

DEO DUTT RAM SUKAL . . . . . PLAINTIFF.

J. C.*

1899

Nov. 14.
Dec. 9.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Joint Estate—Title of Co-parcener by Survivorship—Separate Record of the Widow does not effect Partition—Limitation—Central Provinces Act (XVIII. of 1881), s. 87.

Where a Hindu and his widow had successively held the estate in suit as joint family estate in co-parcenary with the appellant or his predecessor:—

Held, that the appellant succeeded at the widow's death.

Though the widow was recorded under an award by the Collector in the settlement records as owner of an 8-anna share of the estate for her lifetime, that did not operate a separation in title or alter its devolution.

Sect. 87 of Central Provinces Land Revenue Act (XVIII of 1881) did not affect the appellant's claim for the award related solely to the widow's interest.

APPEAL from a decree of the above Court (Feb. 23, 1894) affirming on second Appeal the decrees of the Courts of the Civil Judge of Jubbulpore and of the Judicial Assistant Commissioner.

The respondent sued as reversionary heir to the estate of Sitaram. The appellant defended his possession as entitled thereto by survivorship, having been joint in estate with Sitaram and afterwards with his widow.

The Judicial Commissioner considered that he was bound by the finding of the lower Courts that Sitaram and his widow were, up to the time of their respective deaths, living in a state of union with the appellant or his predecessor. But he took the same view as that of the lower Appellate Court, and held that under the joint operation of the action of the revenue authorities in 1863, under which the names of the co-sharers were recorded separately, and of s. 87 of the Land Act of the Central Provinces (Act XVIII of 1881), a new estate had been

* *Present*: LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C.

1899

REWA PRASAD SUKAL v. DEO DUTT RAM SUKAL.

created in favour of the widow, which would descend in a different way from that in which it would have passed if no such interposition had taken place.

Mayne, for the appellant, contended that the findings of fact by the lower Courts were not open to question in second appeal, and were conclusive in favour of the appellant or his predecessor having been joint with Sitaram and afterwards with his widow, holding joint estate as members of an undivided Hindu family. The action of the revenue authorities in 1863 recording them separately in respect of their shares did not operate a partition of title nor an alteration in the status of the family. Nor was there anything in ss. 87 and 88 of Act XVIII of 1881 which on their true construction destroyed the appellant's right by survivorship or in any way affected his claim.

The respondent did not appear.

1899

Dec. 9.

The judgment of their Lordships was delivered by

LORD ROBERTSON. This appeal was heard ex parte; but the disputed questions are not complicated, and are ultimately confined to a narrow issue by findings in fact which bind this Board. On that issue the grounds of the judgments appealed against are explained with sufficient fulness to allow of their validity being tested with some certainty.

The dispute arose on the death of Nanhi Bahu, widow of Sitaram, in 1889. From 1863 her name had stood, and it stood at her death, recorded in the settlement record as owner for her lifetime of 8-anna shares of the zemindari of certain villages which had been possessed by her husband Sitaram. The present dispute relates to those shares. The primary theory of the case of the plaintiff (the original respondent in this appeal) was that Sitaram's estate was divided estate; and if this had been the fact the plaintiff, as his nearest heir, would admittedly prevail. The defendant (now the appellant), on the other hand, maintained, and he has proved, that the estate of Sitaram was undivided estate, enjoyed by Sitaram jointly with those from whom the appellant

derives. There had, it is true, been a partition in 1824, but this was only between the branch of the family now represented by the plaintiff on the one hand and the rest of the family on the other; the plaintiff's branch dropped out of the community, but the community remained. The findings of the Judicial Assistant Commissioner, Jubbulpore, which are conclusive of the facts in the case, expressly assert that Sitaram was at his death in Shamlat with Partab Singh, who is now represented by the appellant; and, carrying the matter a step further and to the latest date with which this suit is concerned, he finds that Nanhi Bahu was at her death in shamlat with the appellant.

Dislodged by these findings from his original position, the plaintiff relied on the terms of the award of the Deputy Collector in 1863, by which Nanhi Bahu's name was put on the record; and the judges in the Courts below have held that that award had the effect of making the shares enjoyed by Nanhi Bahu separate estate, to which her husband's heir must succeed. This result is supposed to be brought about by the 87th section of the Central Provinces Land Revenue Act (XVIII of 1881).

Before examining the statute and the award itself, it is well to realize the antecedent facts which are held to be thus affected by them. In 1863, when the proceedings were taken which resulted in the award, the parties to them belonged to an undivided family and the estate was undivided estate. The death of Sitaram necessitated some mutation of names for the purposes of revenue; it did not necessitate a partition. His widow's right was to maintenance, but the satisfaction of that right by the assigning to her the enjoyment for the lifetime of a share of the estate is not an unnatural or unaccustomed mode of dealing with property that is undivided and is intended to remain undivided. This is pointed out with clearness and emphasis by the Judicial Assistant Commissioner. "This circumstance," he says, speaking of the mutation of names, "does not seem to me to be of the slightest importance in deciding this question, in view of the well-known practice of members of an undivided family in this part of the country

J. C

1899

REWA PRASAD SUKAL v DEO DUTT RAM SUKAL.

of recording proprietary rights in villages in the shares to which each member of the family would be entitled if he separated, and at the death of each member continuing to enter his share in the name of that member's heirs, although they still continued shamlat." This view of the matter does not require modification even where, as in the present case, the right recorded is one of zemindari, while the original interest was stated to be a patti right.

The next question is, what is the effect of the 87th section of the Land Revenue Act? What the section says is this—it declares, in regard to awards granted before its date (such as that before Their Lordships), that every claim shall be barred which after consideration has been expressly decided to be invalid or inferior to the claims of the person in whose favour the award is made. This provision is clear and needs no explanation. In order to be barred a claim must have been considered—that is, made or tabled as the subject of consideration and expressly decided.

It is now to be seen what was proposed to the Collector for his consideration, and what was done by him in relation to the estate now in dispute. The mover in the application to the Collector was Partab Singh, whose rights are now in the appellant, and whose acts are therefore binding on the appellant. Partab Singh Proposed and the Collector ordered, inter alia, that 8-anna shares should be awarded to Nanhi Bahu "for the lifetime." He did not propose and therefore the Collector had no occasion to consider, anything as to the reversion of those shares after the death of Nanhi Bahu. In particular, the Collector did not consider, because he had no occasion to consider, the appellant's right to possession after Nanhi Bahu's death. Accordingly, viewing the question for the moment apart from the statute, the award does not touch the present dispute.

When the 87th section is fairly examined, it is apparent that while it gives to such awards the effect of judicial decrees it ascribes to them no adventitious force which would not belong to a decree pronounced in pari materie. To be barred by such an award a claim must have been decided by the officer making

the award to be invalid or inferior to the claim of the person in whose favour it is made. The claim of Partab Singh or of any one else to the reversion did not enter the question whether Nanhi Bahu should have the estate for her lifetime. She being the person in whose favour for her lifetime the only award of those 8 annas was made, the claim of no reversioner had any relation to hers, whether of inferiority or invalidity.

The claim which is brought under consideration by the present appellant was therefore not "expressly decided" "after consideration," and is not barred by s. 87. The result is that the law governing the question is the ordinary Hindu law applying to undivided estates; and that law supports the appellant's claim.

Their Lordships will therefore humbly advise Her Majesty that the judgments appealed against ought to be reversed, and that the respondents ought to pay the costs in all three Courts, and to repay costs that may already have been paid them or the original plaintiff by the appellant. The respondents must also pay the costs of this appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

J. C.* 1899

May 3, 4; *July* 8.

MONMOHINI DEBI AND ANOTHER . . . PLAINTIFFS;

AND

ROBERT WATSON & Co. . . . . DEFENDANTS.

THREE APPEALS CONSOLIDATED.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Diluviated Lands—Reformed Lands—Evidence of Identity—Thak and Survey Maps.

Where the evidence is reasonably sufficient to establish the identity of the sites of reformed lands in suit with the sites of lands belonging to the plaintiffs before diluviation they are entitled to recover in ejectment.

The onus is not on the plaintiffs to prove that the area and boundaries before diluviation were accurately represented on the thak map of that period and that the sites in suit exactly correspond therewith. Discrepancies between the thak boundaries and the existing state of the locality may be accounted for:—

Held, in this case, that the agreement of the boundaries of the lands in suit with those in the survey map were sufficient evidence of identity.

CONSOLIDATED APPEALS from three decrees of the High Court (Aug. 20, 1895) reversing three decrees of the Subordinate Judge of Moorshedabad (Aug. 30, 1893).

These appeals related to certain specific plots or chucks of chur or alluvial lands comprised in a mouzah called Diar Shibnuggur; and the question was whether the various chucks claimed in each suit are reformations of the chucks which separately belonged to the plaintiffs in 1853, when that diar was surveyed and thaked, and which are depicted in the thak map then made.

The plaint stated that subsequently to 1853 some of the land which had been so surveyed and mapped had been diluviated, and to a very small extent had reformed in 1878-79; that the said reformed land was surveyed and measured and mapped in 1880 by a revenue officer named Kamal Chunder Dutt, and that the appellants and their co-sharers in the said estate, being dissatisfied with the result of the said officer's inquiries,

**Present*: LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

brought a suit, pending which suit the said reformed land had been again diluviated; that the appellants having got a decree in the said suit executed the same, when the said land had reappeared, and were in possession thereof until they were ousted by the respondents on April 5, 1892, under a decree obtained in a summary possessory suit under s. 9 of the Specific Relief Act (Act I of 1877).

The respondents pleaded limitation, and also that the lands in suit did not correspond with the lands alleged in the plaint to belong to the plaintiff.

The Amin Sarat Chunder Bannerjee was deputed to make a local investigation. He had with him the survey map of 1853, the thak map of that year, and the thak field book, which gives the measurements of each chuck and states the landmarks. The Amin found that these land-marks substantially corresponded with the locality, and that the measurements of the thak chucks were mostly correct.

The Subordinate Judge was satisfied that the Amin had made a proper investigation and arrived at a correct conclusion, excepting that in the northern portion he had adopted the thak line instead of the survey line. Treating this latter as a correct line he gave plaintiffs separate decrees with that variation, recognising the Amin's map as accurate, and constituting that map part and parcel of his decree.

The High Court reversed this decision. They were of opinion that though it was very probable that the Amin had been nearly successful in ascertaining where the old chucks were, still it was nothing more than a probability, which was altogether insufficient to enable plaintiffs to recover khas possession of lands which might belong to defendants or to the owners of other estates. They were further of opinion that at the time this action was brought the lands of this mouzah were not held by the various zemindars in ascertained chucks but in fractional shares, and in order to recover it was incumbent on plaintiffs to prove that Diar Shibnuggur was held by them respectively in defined plots. And, lastly, the learned judges said that, as in none of these suits the proprietors of the other fractional shares were made parties, no binding decree

J. C. 1899

MONMOHINI DEBI v. WATSON & CO.

could be made declaring that any particular lands belonged to any particular estate.

Sir W. Rattigan, Q. C., and *C. W. Arathoon*, for the appellants, contended that the Amin's local investigation and report were rightly relied upon by the Subordinate Judge, and that his decree ought to be restored. The Amin was thoroughly acquainted with the property, and had unusually good materials and data to act upon. The evidence established that the lands were held in separate chucks by the various zemindars, and the Subordinate Judge was right in awarding decrees for separate possession.

Jardine, Q. C., and *Branson*, for the respondents, contended that the appellants had failed to prove that the lands in suit were identical with the lands shewn as belonging to them in the thak map of 1853. The High Court was right in holding that before the appellants could succeed they must establish two propositions, both of which they had failed to do. They should have shewn, first, that the Shibnuggur estate was at date of suit enjoyed by the various owners in defined plots, and not only by the receipt of some fractional share of the profits of the entire esiate; second, that they could demarcate upon the land the exact position of the plots appearing on the thak map of 1853. Failing in this, they failed to establish their title to the lands claimed.

Sir W. Rattigan, Q. C., replied.

1899

July 8.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. These are consolidated appeals in suits brought by the several appellants and others against the respondents to recover possession of lands in the district of Moorshedabad known as mouzah Diar Shibnuggur. The mouzah consisted of six towzis or revenue-paying estates in shares numbered 405, 268, 269, 270, 271, and 1580, the last number not being included in these suits. The lands in dispute were a large number of ascertained chucks or demarcated plots of land belonging to these several estates and shewn on the thak map made on a preliminary survey of the mouzah by

the Government for revenue purposes, those which belonged to the estate No. 270 being coloured red, to the estate No. 271 blue, and to Nos. 405, 268, and 269 uncoloured, and the chucks being held by the owners of the estate in fractional shares as between themselves. In 1853 the river Pudma, which adjoined the mouzah, began to diluviate its lands, and at some time between that date and 1869 the whole of the lands in dispute in these suits had become diluviated. In 1869 a portion of them had been reformed, and a survey was made of it for the purpose of assessing revenue. Shortly afterwards this portion was again diluviated, but by 1880 it had been again reformed, and was surveyed on behalf of the revenue authorities. In May, 1883, the owners of 405 and 270 brought a suit against the Government and the owners of the other estates to recover joint possession of the reformed land on the ground that it was a portion of their estates and had been wrongfully taken possession of by the Government. The owners of 268 and 271 were at first made defendants, but were afterwards made plaintiffs instead of defendants. In 1886, the plaintiffs having come to terms with the Government, there was a judgment by consent in their favour as to a portion of the land claimed, and they were allowed to withdraw the suit as to the remainder with liberty to bring a fresh suit.

In 1891 a large part of the reformed land, which then had an area about two miles in length and one in breadth, had become valuable, and 600 bighas of it had been sown by the respondents with indigo and wheat, and scattered plots were being cultivated by ryots from the other lands of the mouzah. The servants of the respondents having in October, 1891, whilst they were reaping indigo, been attacked by persons at the instigation of the appellants and driven of the newly formed lands, the respondents brought a suit under the Specific Relief Act to recover possession, and obtained a decree under which they were in April, 1892, put in possession by the Court of the whole of the newly formed lands. Thereupon the present suits were brought and were tried together.

In two of the suits, 380 and 381 of 1892, the issue framed was whether the lands in suit fell within the plaintiffs' alleged

J. C. 1899

MONMOHINI DEBI v. WATSON & CO.

chucks No. 60, &c., and No. 58, &c. In the third suit, 437 of 1892, the issue was in a different form: Whether the lands in suit fell within the residue of No. 34 of the thak and survey of 1853; and if so, were the plaintiffs proprietors of the same. In the former two suits there was a formal admission by the defendants' pleader that the chucks as numbered belonged to the plaintiffs. In the latter suit it does not appear to have been disputed that the residue of No. 34 belonged to the plaintiffs if the issue raised that question. The real question in all the three suits is whether the sites of the reformed lands claimed are identical with the sites of the lands which belonged to the appellants before the diluviation. According to the practice of the Indian Courts in such cases from a very early period, a commission was issued under the provisions of the Civil Procedure Code to the Civil Court Amin to make a local investigation and to report thereon to the Court. He began his proceedings on December 21, 1892, and on May 27, 1893, he made his report with a map annexed to it. The investigation had occupied him twenty-seven days. The report with the evidence which he took is in the record, and his investigation appears to have been very carefully made in the presence of the representatives of the parties. In the report he says that "the land-marks given in the thak map (preliminary survey) correspond with the land-marks given in the survey (the final) map and those existing on the boundaries in the locality; but when the thak is compared throughout from any one of the aforesaid marks or points, the thak lines do not agree in length with the survey lines and the ridges in the locality. Evidence has been taken with the regard to the boundaries pointed out on behalf of the plaintiff." After referring to this evidence the report says, "such discrepancies are generally found in the boundary lines of the survey map, therefore this should not be taken into account." After noticing some discrepancies between the thak boundaries and the state of the locality, the Amin says, "such faults occur in the thak in several cases, and I have found such faults in course of several investigations." In conclusion he says, "in places where the thak and survey map do not agree with each other it is proper to act according

to the survey, and, especially as in this case the survey map corresponds with the locality, I determined the boundary line according to the survey, and having plotted the thak chucks according to it, I have determined the disputed land."

The Subordinate Judge, who had before him the thak field book which is in the record of the appeal in the suit 437 of 1892 as well as the thak map, agreed with the Amin that when the thak and survey maps disagreed the survey map ought to be adopted for fixing the boundary line, and after discussing the evidence in the case decided in favour of the plaintiffs in the three suits for part of the claim in each of them, and marked on the Amin's map by lines described in the judgment the lands which he found to belong to them respectively. Finding other issues also for them, he made a decree in each of the suits in favour of the plaintiffs, the Amin's maps being ordered to form part of it. The present respondents appealed to the High Court, which Court (consisting of the Chief Justice and another judge) reversed the decrees of the Subordinate Judge, and dismissed the plaintiffs' suits with costs. Taking the suit 380 of 1892, and saying that if that suit fails the other two must also fail, the learned judges in their judgment say they think the plaintiffs had failed to make out a prima facie case; that in order to do so the plaintiffs must prove that it was then possible to find and demarcate upon the reformed land on the bank of the Pudma plots and chucks of land which occupy precisely the same position on the surface of the earth as the plots or chucks which are represented by the colour red on the thak map of 1853; that "this must depend upon whether the thak map is an accurate representation of the area and boundaries of the mouzah as it existed in 1853, and whether the materials then existed to enable a skilled Amin to lay down upon that map an accurate map of the area and boundaries of the mouzah in its present condition"; that there were inaccuracies in the thak map and the survey which the Amin and the Subordinate Judge and rectified; that if the thak map were accurate it would no doubt be possible to find from it the red inclosures upon the land, "but as soon as it appears, as it does here from the

J. C.

1899

MONMOHINI DEBI v. WATSON & CO.

plaintiff's own evidence, that the thak map is inaccurate, it must follow that any attempt to place the fields shewn upon it upon the present surface of the land can be nothing more than a guess, and thus, though it is very probable that the Amin has been nearly successful in ascertaining where the old chucks were, still it is nothing more than a probability, which is altogether insufficient to entitle the plaintiffs to recover khas possession of land which may belong to the defendants or to the owners of either of the other estates." Their Lordships are unable to agree in this reasoning. It requires an amount of accuracy in a thak map which cannot reasonably be expected in it. If the learned judges are right in their view of the accuracy which is necessary, there would be very few cases in which the owner of diluviated land would be able to recover possession of it when it was reformed. In most cases the persons who were alert in going upon the land and making any kind of cultivation of it would acquire a title to it. Their Lordships are of opinion that there was sufficient evidence on the part of the plaintiffs to entitle them to recover possession of the land, and they will humbly advise Her Majesty to reverse the decrees of the High Court to order the appeals to it to be dismissed with costs, thereby affirming the decrees of the Subordinate Judge. The respondents will pay the costs of the present appeals, but not including the costs of the petition to have the appeals consolidated, or of the petition of the appellants heard on April 25, 1899, to have the hearing of the appeals postponed. The respondents' costs of opposing both these petitions are to be paid by the appellants.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Freshfields & Williams.*

ROSHAN SINGH . . . . . PLAINTIFF ; J.C.*

AND 1899

BALWANT SINGH . . . . . DEFENDANT. *Nov.* 8, 28.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law—Illegitimate Son—Right to Maintenance.

Among Hindus of the twice-born classes an illegitimate son takes no part in the inheritance ; but he is entitled to maintenance from the estate of his father.

Chuoturya Run Murdun Syn v. Sahub Purhulad Syn, (1857) 7 Moore's Ind. Ap. Ca. 50, followed.

The right to maintenance is a personal right, and is not heritable.

APPEAL from a decree of the High Court (Feb. 18, 1896), reversing a decree of the Subordinate Judge of Aligarh (March 31, 1894).

The appellant sued in forma pauperis to redeem a mortgage of the Husain estate, including forty-three villages, on payment of Rs.51,000. The defendant is the representative of the mortgagee.

The title alleged by the appellant was that his ancestor had been allowed for his maintenance out of the Hussain estate some villages and a malikana allowance of Rs. 457, that the Husain estate was liable therefor, that even if his father Bhoj Singh was illegitimate the estate was nevertheless liable for his maintenance, and that by reason of such liability he was entitled to redeem the estate. The defendant contended that the plaintiff himself had no right of maintenance out of the sstate, and no right to deem.

The Subordinate Judge gave him a decree for redemption and possession of the villages on payment by him of Rs.51,000 and costs within six months of the date of the decree.

His view was that the plaintiff had a right to redeem the mortgage in question, notwithstanding the fact that his

* *Present* : THE LORD CHANCELLOR, LORD HOBHOUSE LORD, MORRIS, LORD DAVEY, SIR RICHARD COUCH, and MR. ROBERTSON.

J. C.

1899

ROSHAN SINGH v. BALWANT SINGH.

father was illegitimate. He considered it proved that Bhoj Singh and his father and grondfather before him received up to the date of the mortgage, maintenance out of the family property in the shape of a malikana allowance of Rs.457 per annum, to which the plaintiff, as the legitimate son of his illegitimate father, was clearly entitled in lieu of his "charge for maintenance" upon the Husain estate, and that he was in consequence a person who had an interest in the mortgaged property, and hence was entitled to redeem the mortgage in suit under s. 91 of the Transfer of Property Act (Act IV. of 1882).

The High Court in appeal said :—

"Now, assuming that the plaintiff is entitled to maintenance from the Husain estate, that right to obtain maintenance cannot, in the absence of a contract or of a decree of Court making the maintenance a lien on the estate, be regarded as a charge on the estate within the meaning of ss. 91 and 100 of Act No. IV. of 1882, as was held in *Kuar Shiam Singh* v. *Raja Balwant Singh* (1), decided by this Court on the 11th of June, 1895. It is urged bofore us that although the plaintiff may not have a charge on the property in question he has an interest in it, inasmuch as his father Bhoj Singh was entitled to a malikana allowance in lieu of his maintenance. There is nothing before us to shew that if Bhoj Singh was entitled to maintenance, or to a malikana allowance in lieu of maintenance, that allowance was one which was not limited to the term of his life, but was heritable by his son. According to Hindu law, an illegitimate son of a person belonging to one of the three regenerate classes is entitled, if docile. to obtain maintenance from his father. No authority has been shewn to us for holding that this is anything but a personal right. Therefore, even if it be assumed that Bhoj Singh was granted a malikana allowance in lieu of his maintenance, it would not follow that that allowance would pass to his son. The Subordinate Judge was clearly in error in holding that the plaintiff was entitled to the malikana allowance which Bhoj Singh is said to have enjoyed. Consequently the plaintiff has no right to redeem the mortgage

(1) F. A. No. 295 of 1893.

in question. This is sufficient to dispose of this suit. The plaintiff having no right of redemption, his suit should have been dismissed."

Sir W. Rattigan, Q.C., and *C. W. Arathoon*, for the appellant, contended that this decision was wrong. It was proved that, in the family to which the appellant belonged by right of birth, his line or branch of it was entitled to a substantial portion of the family estate by way of maintenance of that line or branch. The appellant's right thereto was, in succession to his father, a charge upon and an interest in the whole estate within the meaning of s. 91 of the Transfer of Property Act, and by virtue of that charge and interest he had a locus standi to maintain against the mortgagee of that estate a suit to redeem. The appellant's father, as an illegitimate son, was not nullius filius by Hindu law. He had a recognised status in his father's family, by virtue of which he was a member of the joint family to which his father belonged. An illegitimate son does not possess at the present time (whatever may have been the case formerly) coparcenary right in the family estate, but he has a vested right to maintenance out of the estate. See *Pandaiya Telaver* v. *Puli Telaver* (1); Mitakshara, c. I. s. xi. vv. 30, 31, 33. Reference was made to Mitra's Tagore Law Lectures (1895-6), p. 66, where texts of Vishnu are cited expressly recognising the right of the sons of an illegitimate son to maintenance : see paragraphs 37, 39. The general principle is that disqualification to share in an estate does not carry with it a disqualification to be maintained ; while the Hindu law is liberal in allowing rights of maintenance, especially to those whom it regards as members of the family. Such right as is claimed in this case is not merely a personal right but a heritable one, to which the appellant succeeded as the legitimate son of an illegitimate father. It was a right based on kinship, and must be regarded as a legal right analogous to any other right of property, and as such a heritable right.

Mayne, for the respondent, contended that by the Hindu law an illegitimate son can claim maintenance from his father only,

(1) (1863) 1 Mad. H. C. 478, 482.

J. C.

1899

ROSHAN SINGH *v.* BALWANT SINGH.

not from his collateral relations, or from the estate of the joint family to which his father belonged. The right of the illegitimate son, moreover, is only a personal right, and is not transmissible by inheritance, and consequently the appellant has no claim at all. He referred to Mitakshara, c. I. s. xii. v. 3; c. I. s. xi. vv. 26, 27; *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (1); *Hargobind Kuari* v. *Dharam Singh* (2), as shewing the personal right. There is no authority for saying that it is a heritable right.

Sir W. Rattigan, Q.C., replied.

The judgment of their Lordships was delivered by

1899

Nov. 28.

LORD HOBHOUSE. The defendant in the original suit, now respondent, is in possession of the Husain Talook by virtue of a mortgage effected in the year 1838 by the Talookdar Narain Singh. The plaintiff seeks to redeem the property. The Subordinate Judge decreed redemption on payment of Rs. 51,000 and interest to date of payment. The High Court reversed that decree and dismissed the suit.

The plaintiff is the son of Bhoj Singh, who was son of Indarjit and first cousin once removed of Narain; the common ancestor of the two being Mittar Singh, the grandfather of Narain and the great-grandfather of Bhoj. The plaintiff first claimed title as a co-sharer in the estate; but he failed in that claim because his father Bhoj was not the legitimate son of Indarjit. The plaintiff still claims to redeem on the ground that he is entitled to maintenance out of the estate, which, as he contends, is a charge or interest carrying with it the right to redeem within the terms of the Transfer of Property Act, 1882. This position he seeks to establish in two ways. First, he alleges a title by contract with the widows and heirs of Narain. Secondly, he contends that Bhoj, though excluded from inheritance, was entitled to maintenance from the estate, and that Bhoj's title has descended to himself.

The contract with the widows is contained in a declaration by them dated August 20, 1850. It appears that Bhoj had sued to recover the whole estate from them, that his suit had

(1) 7 Moore's Ind. Ap. Ca. 18, 50. (2) Ind. L. R. 6 Allah. 329.

been dismissed by the Sudder Ameen, and that he had appealed to the Sudder Dewani Adawlut. The operative part of the declaration is as follows :—

"Now through fear of ruining the ancestral estate he came on the right path, and of his own free-will and accord came to us and so we are also pleased with him. We therefore declare in writing that we shall continue to pay Rs. 457 from the malikana dues to the said Kuar without objection after taking possession of the said villages under the settlement proceeding, as the same was paid for maintenance to the forefathers of the said Kuar by the Raja, masnad-nashin of this family."

Four days later Bhoj executed a deed of relinquishment in which he withdrew his appeal and stated, "In fact the appellant has no right except to the malikana dues of village Allahdinpur which was formerly granted to his grandfather Sanwant Singh by Raja Narain Singh."

From these documents the Subordinate Judge deduces the conclusion that the widows of Narain, in whom a widow's estate was then vested, granted or agreed to continue a malikana allowance, which was charged on the estate in favour of Bhoj, and on his death descended to the plaintiff. But there is no such agreement. What virtue there might be in the word "malikana," or in the thing signified, we need not discuss; for the widows do not profess to vest or to recognise any malikana right in Bhoj. There is nothing in the Record to shew any malikana right in anybody but the widows except the indirect assertion of Bhoj himself that malikana dues over one of the forty-three villages for which he was suing had been granted to his grandfather. The malikana dues of the estate belonged to the widows subject to the morigage by Narain. They were not in possession. All they undertake is that when they get possession they will out of the malikana dues so recovered pay Rs. 457 a year to Bhoj, as the same was paid to his forefathers. In point of fact the agreement has been wholly ineffectual, because the widows, who have now been dead for many years, never got possession at all. But if they had, they only agreed to make a money payment to Bhoj

J.C.

1899

ROSHAN SINGH *v.* BALWANT SINGH.

personally, and they did nothing to create a heritable interest in him or any charge on the inheritance.

The more general question of law raised by the plaintiff relates to the position of the offspring of an illegitimate son. The family belongs to one of the twice-born classes. Among them an illegitimate son takes no part of the inheritance; but he is entitled to maintenance from the estate of his father. This law is found in ss. 11 and 12 of c. I. of the Mitakshara. In paragraph 3 of s. 12 it is thus stated: "It follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share .... but if he be docile he receives a simple maintenance." There is no reason to think that this effect of illegitimacy differed according to the particular mode of it; and the more general statement applying to illegitimacy generally which their Lordships have just made is embodied in the judgment of this Board in *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn.* (1)

The Subordinate Judge, whose opinion has been supported at this bar in an able argument by Sir William Rattigan, reasons thus. He states the rule that illegitimate sons of a Hindu are entitled to maintenance out of their father's estate. He then continues: "Bhoj Singh was entitled to maintenance out of the estate held by Narain Singh, not because of his relationship with Narain Singh, but because he was a son of Indarjit Singh, who in his turn had a share in the estate. I have therefore no doubt that as the estate was joint family property of the descendants of Mittar Singh, among whom Bhoj Singh was one, the latter as such member, though of illegitimate descent, was entitled to be maintained out of the estate."

It seems to their Lordships that this reasoning leaves the difficulty of the plaintiff's case wholly untouched. Conceding that Bhoj could claim maintenance as against Narain, the question is whether he could transmit that claim to his son. Indarjit, we are told, had a share in the family estate. Bhoj then had a right to maintenance out of Indarjit's estates including that share. But Bhoj had no share in the family estate

(1) Moore's Ind. Ap. Ca. 50. 53.

out of which the plaintiff could be maintained; therefore the plaintiff's right to be maintained out of his father's estate does not place him in the same relation to the family estate as Bhoj derived from his right in respect of Indarjit's estate.

On this point the High Court, speaking of Bhoj's right, say, "No authority has been shewn to us for holding that this is anything but a personal right." Neither has any been shewn to their Lordships. Sir William Rattigan cited *Pandaiya Telaver* v. *Puli Telaver* (1), which he contended was a direct authority in his favour. But the question there was whether an illegitimate daughter entitled to maintenance out of her father's estate was so far a member of his family as to make a marriage with her a lawful marriage; and the Court held that she was. Whether right or wrong, that decision has no bearing on the question whether a right to be maintained, vested in one who cannot inherit, is itself a heritable right. The plaintiff's proposition does not appear to follow from the expression in the Mitakshara, which says that the illegitimate son "if he be docile receives a simple maintenance." On the contrary, that passage is more consistent with a purely personal right; and there is no authority either of texts or of decisions to contravene the obvious meaning.

The plaintiff would also, before he could succeed, have to shew that a claim for maintenance, not founded on contract or decree, is an interest in or charge upon the property within the meaning of the Transfer of Property Act. The High Court think it is not. The point has been much discussed at the bar, but no authority has been produced either way. As the principle on which their Lordships have expressed their concurrence with the High Court goes to the root of the plaintiff's title to maintain this suit, it is not necessary for them to decide the second point. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondent : *Pyke & Parrott.*

(1) 1 Mad. H. C. 478.

J. C.* BALKISHEN DAS AND OTHERS . . . . DEFENDANTS;

1899

AND

June 27, 28; *July* 4, 5; *Nov.* 11. LEGGE . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Deeds of Sale and Repurchase—Mortgage—Right to Redeem—Regulation I. of 1798—*Regulation XVII. of* 1806—*Indian Evidence Act*, 1872, *s.* 92.

Where deeds of conditional sale of a talook with a proviso for repurchase on a fixed date contained clauses to the effect that the vendor may deposit "by virtue of this agreement" the amount due on repurchase in a mode similar to that provided by Regulation I. of 1798, and to the effect that the said amount should include, not merely the original price, but also a debt due on another property:—

Held, that the latter debt was thereby consolidated with the original price and charged on the talook, and that consequently the deeds of conditional sale must be regarded entirely as mortgages within the meaning of Regulation I. of 1798, and Regulation XVII. of 1806.

Oral evidence of intention is inadmissible for the purpose either of construing the deeds or of proving the intention of the parties: see s. 92 of Evidence Act, 1872.

Quaere, whether conditional sales become subject to an equity of redemption by force of those regulations in the absence of any indication contained therein that they are intended to be mortgages.

APPEAL from a decree of the High Court (April 23, 1897) substantially affirming a decree of the Subordinate Judge of Jaunpur (Feb. 8, 1895).

The suit was brought by the respondent to redeem a talook which he alleged had been mortgaged to the appellants or their predecessors on February 4, 1873, by a conditional deed of sale set out in their Lordships' judgment.

The defence was that the real transaction evidenced by the deed of February 4, 1873, and other deeds, was that the estate was held under an absolute deed of sale with a collateral agreement that the vendor should be allowed to repurchase it upon but not after a stipulated date which had elapsed upwards of

* *Present*: LORD WATSON, LORD HOBHOUSE, LORD DAVEY, SIR RICHARD COUCH, and SIR EDWARD FRY.

eighteen years before suit. Both Courts held that the documents constituted a redeemable mortgage.

The Subordinate Judge in his judgment stated that the usual course in which a property is mortgaged according to the custom of the Mahomedans (which prevailed in that part of the country) was to execute two documents, one of which was a deed of absolute sale, and the other a deed empowering the original owner to take back the property on payment of the proper amount to the other party.

He then observed that the deed of agreement of February 4, 1873, contained an express provision as to depositing the money in the Government Treasury, and that such a provision was only found in mortgage deeds. He also found that the evidence established the intention of the parties to have always been the execution of a mortgage and not an out-and-out sale. He gave a decree for redemption. The High Court affirmed this decision, saying: "Upon a consideration of the terms of the ikrarnama, the surrounding circumstances and the oral evidence, we have come to the conclusion, in concurrence with the Court below, that the contracting parties intended the transaction to be one of mortgage by conditional sale, and not an absolute sale with a right to repurchase. This case is, therefore, perfectly distinguishable from that of *Bhagwan Sahai* v. *Bhagwan Din* (1), decided by their Lordships of the Privy Council, and relied upon by the defendants."

Mayne and *Colvin*, for the appellants, contended that, on the true construction of the deeds of February 4, 1873, the Court should have held that they put an end to the relation of debtor and creditor between the parties, and that the bankers, the appellants, became absolute owners of the talook, subject to an obligation to reconvey if Mr. Legge tendered on the specified date, March 1, 1876, Rs. 1,65,000, and any further balance due under the deed of estimate of April 8, 1872, that is a deed of mortgage of some factories. This it is admitted Mr. Legge did not do, and therefore the sale became indefeasible on and from that date. The Court was wrong in holding that there

(1) (1890) L. R. 17 Ind. Ap. 98.

J. C.

1899

BALKISHEN DAS v. LEGGE.

was anything in the surrounding circumstances which allowed them to put a different construction upon those deeds; and also, in the absence of fraud alleged and proved, in admitting oral evidence as to what the parties supposed to be the meaning of the documents which they have executed: see Indian Evidence Act (I. of 1872), ss. 92, 93, which excludes evidence of everything outside the written agreement. The Courts have relied on an assumed usage of Mahomedans to use language as conveying one meaning when according to law it bears another meaning. Here there was no loan, no debt, no mortgage. There was sale and purchase-money with a contract to repurchase on a day fixed, beyond which day the right to repurchase did not exist. Reference was made to *Bhagwan Sahai* v. *Bhagwan Din* (1), which approved the doctrine laid down in *Alderson* v. *White* (2), that the relationship of creditor and debtor must be shewn to exist before a sale with a right to repurchase can be held to be a mortgage; to *Situl Pershad* v. *Luchmi Pershad Singh* (3), where the contention as to mortgage was overruled having regard to the terms of the instruments and the surrounding circumstances; and to *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *North Central Wagon Co.* (4).

Cohen, Q. C., and *De Gruyther* (*A. J. Ashton* with them), for the respondent, contended that the effect of the deeds of February 4, 1873, was to constitute a mortgage by conditional sale (bye-bil-wufa). The terms of the instruments shew that at the time of execution thereof they were intended to operate as a mortgage, and not as an out-and-out sale. The form actually adopted of executing a deed of sale giving an option of repurchase is that usually adopted in the North-West Provinces in the case of mortgages by conditional sale. Amongst Mahomedans it is the universal practice. It enables them to take interest contrary to the Mahomedan law. And in Mahomedan law there is no such thing known as pledge by hypothecation. It is always by sale and resale: see Baillie's Law of Sale, p. 301. The deeds contain provisions (1.) for redemption by deposit in

(1) L. R. 17 Ind. Ap. 98.
(2) (1858) 2 De G. & J. 97, 105.
(3) (1883) L. R. 10 Ind. Ap. 129.
(4) (1888) 13 App. Cas. 554, 560, 567.

court under Regulation I. of 1798; (2.) that the estate should be a security for future advances made to work the factories; (3.) that the repurchase should be for Rs. 1,65,000, which is Rs. 15,000 in excess of the amount for which the estate was ostensibly sold. These provisions are strong to shew that the real intention of the parties was to mortgage and not to sell. This is a security for money within the meaning of Regulation I. of 1798: see the preamble. See also the terms of Regulation XVII. of 1806. The right to redeem does not appear in transactions of this class on the face of the deed: it is an incident annexed by law. Reference was made to Macpherson on Mortgages, 7th ed. pp. 15, 16; Ghose on Mortgages (Tagore Law Lectures, 1876), p. 136; *Forbes* v. *Ameeroonissa Begum* (1), where the general effect of the foregoing regulations is considered in reference to a transaction of bye-bil-wafa constituted by deeds of absolute sale and defeasance; *Pattabhiramier* v. *Vencatarow Naicken* (2), a Madras case, where it was held that a conditional sale became absolute merely because the Bengal Regulations allowing redemption at any time before foreclosure had not been extended to Madras, and the English law relating to an equity to redeem was unknown to the ancient law of India: *Thumbaswamy Mudelly* v. *Mahomed Hossein Rowthen* (3); *Alderson* v. *White* (4); *Rakken* v. *Alagappudayan* (5), where a transaction on the footing of an absolute sale deed was put down to a mortgage by oral evidence that such was the intention and agreement of the parties; *Rochefoucauld* v. *Boustead* (6), where all the cases are collected bearing upon the real transaction being substituted for the ostensible one; *Baksha Lakshman* v. *Govinda Kanji* (7), which gives the doctrine and practice in Bombay in reference to the conduct of the parties to an absolute sale and to the admissibility of oral evidence to shew that it was in intention a mortgage. See also *Bhup Kuar* v. *Muhammadi Begum* (8),

(1) (1865) 10 Moore's Ind. Ap Ca. 346.
(2) (1870) 13 Moore's Ind. Ap. Ca. 560.
(3) L. R. 2 Ind Ap. 241.
(4) 2 De G. & J. 97, 105.
(5) (1892) Ind. L. R. 16 Mad. 80.
(6) [1897] 1 Ch. 196.
(7) (1880) Ind. L. R. 4 Bomb. 594.
(8) (1883) Ind. L. R. 6 All. 37.

J. C.

1899

BALKISHEN DAS v. LEGGE.

Ali Ahmed v. *Rahmat-ullah* (1); *Kubra Bibi* v. *Wajid Khan* (2); *Bhagwan Sahai* v. *Bhagwan Din* (3); *Ramaswami Sastrigal* v. *Samiyappa Nayakan* (4); *Ras Muni Dibiah* v. *Prankishen Das* (5); *Forbes* v. *Ameeroonissa Begum* (6), where the deeds were precisely the same as here. The only course to be adopted is to ascertain what was the intention amongst persons in the country lending and borrowing money who used those words and deeds. The respondent's conduct shews that he intended a mortgage.

Mayne, replied.

The judgment of their Lordships was delivered by

1899

Nov. 11.

LORD DAVEY. In and prior to the year 1872 Hari Das and the appellant Balkishen Das carried on business as bankers at Benares. Hari Das was the managing partner. He died on April 27, 1889. The present appellants are Balkishen Das and the two sons and heirs of Hari Das. The respondent was at that time the owner of a talook called Patilah, in the district of Jaunpur, and was also half-sharer of certain indigo factories known as Basharatpur, and carried on the business there in partnership with one De Momet, his co-sharer. By a deed dated April 8, 1872, the talook was mortgaged to Hari Das and Balkishen Das for Rs. 1,25,000, and by another deed of the same date (called a deed of estimate), the factories were also mortgaged to them as security for Rs. 60,000, which sum was to be applied partly in payment of previous debt and partly in providing for the necessities of the indigo business for the current year. At the end of the year 1872 it was found that the business had been carried on at a loss. The debt due to the bankers was Rs. 1,90,000, and further advances were needed for carrying on the business. The respondent in these circumstances bought out his partner De Momet, and became sole owner of the factories and solely interested in the business. A fresh bandobast or settlement was thereupon made between him and

(1) (1892) Ind. L. R. 14 Allah. 195
(2) (1893) Ind. L. R. 16 Allah. 59.
(3) L. R. 17 Ind. Ap. 98.
(4) (1881) Ind. L. R. 4 Mad. 179.
(5) (1848) 4 Moore's Ind. Ap. Ca. 392.
(6) 10 Moore's Ind. Ap. Ca. 346.

the bankers, and was carried into effect by three deeds, of which two relating to the talook were dated February 4, 1873, and the third, relating to the factories, was dated April 6, 1873.

The first deed of February 4, 1873, was on the face of it an absolute sale by the respondent to the bankers for the price of Rs. 1,50,000, which was expressed to be paid in the following manner, namely, the bankars retained out of the Rs. 1,50,000 the sum of Rs. 1,37,333 6*a*. principle with interest up to date, which had by calculation been found due by the respondent to the bankers under the mortgage deed of the talook dated April 8, 1872, and retained the balance Rs. 12,666 10*a*. in part payment of the amount then due on the deed of estimate of expenses for conducting the factories of the Basharatpur concern.

The other deed of February 4, 1873, was in the following terms :—

"We, Babus Hari Das and Balkishen Das, sons of Babu Padam Das, proprietors of the firm of Babu Madhuban Das and Dwarka Das, caste Gujrati, resident of mohalla Gwaldas, in the city of Benares, do declare as follows :—

"The vendor, Mr. William Francis Legge, having, under the sale deed dated 4th February, 1873, sold absolutely for Rs. 1,50,000 his zemindari right and property in the entire 16 annas of talook Patilah, pargana Ungli, in the district of Jaunpur, comprising 25 villages, original and attached, together with all the sir, sayer items, high and low lands, water and forest produce, water places and tanks, cultivated, uncultivated, saline, waste and jungle lands; village sites, ponds, kutcha and pakka wells, collection houses, tenants' quarters, bamboo clumps, groves and detached fruit and timber trees of all sorts, and stone and wooden mills, inclusive of all the zemindari rights and interest appertaining to the said talook, without exclusion of any right or property, to us, the executants, has caused mutation of names to be effected. We, the executants, therefore, of our own free-will and accord, covenant and declare that if the said vendor pays on 1st March, 1876, the amount of Rs. 1,65,000 in a lump sum we shall sell to the said vendor the whole of the said ilaka sold, as it exists at present, for the said amount of Rs. 1,65,000, and we shall cause everything connected

J. C.

1899

BALKISHEN DAS v. LEGGE.

with mutation of names of, &c., to be done, neither we nor our heirs shall have any objection thereto. If we or our heirs raise any objection to receive the money and relinquish the property, the vendor shall be competent to deposit the said amount in cash in the treasury, by virtue of this agreement, and obtain possession over the ilaka, we shall have no sort of objection to it. It has further been stipulated by the executants and the vendor that if the amount of the estimate money of the Basharatpur concern should keep varying on account of alterations made by consent of us, executants, from year to year, then the vendor shall be liable to pay along with the sum above mentioned, whatever sum may be found to be due at that time by him to us, executants. The sahib shall not be competent to effect a sale until the payment of the estimate money relating to the factories of the Basharatpur concern. We shall recover from the vendor any amount of arrear that may be due to us by the cultivators by making an assignment thereof in favour of the vendor, and after the expiry of 1st March, 1876, the said vendor shall not be competent either to pay the money or to make the purchase and the conditions of this deed of agreement shall be deemed to be null and void."

The question between the parties in this appeal is whether these two deeds together constituted a mortgage of the talook or an out-and-out sale with a contract of repurchase.

After the execution of these deeds the bankers made further advances to the respondent to a large amount on account of the Basharatpur concern. By the third deed, dated April 6, 1873, the sum of Rs. 44,223 14*a*. 3*p*. was found due from the respondent up to date, and he mortgaged the factories for Rs. 75,000, out of which the balance was paid off and money was provided for working the factories during the current year.

On March 3, 1874, another deed of estimate was executed for that year, and finally, by a deed dated March 25, 1875, the respondent sold and conveyed the factories to the bankers for a price which left him a debtor to them in the sum of Rs. 5,953 4*a*. 3*p*. There is no deed of defeasance to this deed, and it was admittedly an absolute sale.

It should be noticed that on the execution of the deeds of-

February 4, 1873, the necessary mutation of names was made, and the bankers entered into and have ever since been in possession or receipt of the rents and profits of the talook.

The respondent did not buy back or redeem the property on March 1, 1876. But on November 5, 1894, he commenced the present action for redemption of the talook, alleging that the deeds of February 4, 1873, constituted a mortgage by conditional sale with possession thereof. The defendants and present appellants, on the other hand, contended that the transaction was an absolute sale with a contract of resale, and the time having expired and the condition not having been fulfilled the contract had become null and void.

The Subordinate Judge held that the documents in question were deeds of mortgage by conditional sale, and that the respondent was entitled to redemption. His judgment was affirmed by the High Court.

Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By s. 92 of the Indian Evidence Act (Act I. of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, or adding to or subtracting from its terms subject to the exceptions contained in the several provisoes. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to shew in what manner the language of the document is related to existing facts.

J. C.

1899

BALKISHEN DAS v. LEGGE.

Mortgages by conditional sale under various names are a common form of mortgage in India, and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Mahomedans contrary to the precepts of their religion to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale "kutkubala" or "bye-bil-wufa" that the mortgagor should make himself personally liable for the repayment of the loan : see Macpherson on Mortgages, 5th ed. p. 11.

By Bengal Regulation I. of 1798, intituled "a regulation to prevent fraud and injustice in conditional sales of land under deeds of bai-bil-wufa or other deeds of the same nature," provisions were made for the case of the lender refusing to receive the money on the day named. The borrower was empowered to deposit the amount due on or before the stipulated date in the Dewanny Adawlut of the city or zillah in which the land may be situated. If the lender has obtained possession of the land the principal sum only need be deposited, leaving the interest to be settled in an adjustment of the lender's receipts and disbursements during the period he has been in possession. By Regulation XVII. of 1806 the mortgagor under deeds of this description was empowered to redeem the land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive, provided that payment or tender be proved or deposit be made within the time above specified in the manner specified in the previous Regulation.

In the case of *Pattabhiramier* v. *Vencatarow Naicken* (1) it was decided that, according to the ancient law of India, a mortgage by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was, therefore, to introduce into those parts of India to which the Regulation applies the English doctrine of an

(1) 13 Moore's Ind. Ap. Ca. 560.

equity of redemption as applicable to the class of deeds referred to in it.

Mortgages of this character are thus defined in clause (*c*) of s. 58 of the Transfer of Property Act, 1882: "Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale." The Transfer of Properiy Act does not apply to this transaction, but it may be assumed that the framers of it in this section intended to state the existing law and practice of India.

The appellants argue that the language, whether of this Act or of the Regulations, shews that in order to attract their provisions there must be underlying ostensible arrangements for sale a real, substantial intention to secure money advanced. They rely on the decision of this Board in the case of *Bhagwan Sahai* v. *Bhagwan Din*. (1) Their Lordships decided that case on the language of the deeds then in question, which they evidently considered shewed that the transaction was not such a transaction as is described in the Regulation of 1806, and there was therefore no right of redemption after the expiry of the date fixed. The appellants contend that such ought to be the conclusion in the present case, seeing that the parties did stand in the relation of lender and borrower prior to 1873, and then expressly altered it into that of buyer and seller. The respondents, on the other hand, contend that a conditional sale becomes subject to an equity of redemption by force of the Regulations before mentioned, independently of any indications in the document that it is intended to be a mortgage. This is a question on which their Lordships are not called on to express an opinion in this case, for the documents in question contain important indications of the intention of the parties. The second deed or ikrarnama provides that if the bankers object to receive the money and

(1) L. R. 17 Ind. Ap. 98.

J. C.

1899

BALKISHEN DAS v. LEGGE.

relinquish the property the vendor may deposit the amount in the treasury "by virtue of this argeement," and obtain possession over the ilaka. This provision at once suggests a reference to Regulation I. of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or practice by which such deposit could be made by virtue of the agreement alone, without the intervention of the Court, in a suit for the purpose, while on the other hand the words exactly describe the procedure under the Regulation. Again, the estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the Basharatpur concern as of the stipulated sum of Rs. 1,65,000. The practical effect of this was to consolidate the debt on the factories' account with the principal sum mentioned in the deed, and to give the bankers a security on the talook for the debt of the factories. This gives the transaction the character of a mortgage, so far as the factory accounts are concerned, and if it is to some extent a mortgage it may well be held to be so entirely. There was also some evidence, though not very precise, that the property in the year 1873 was worth considerably more than Rs. 1,50,000. This was accepted in the Court below, but their Lordships do not place much reliance upon it.

Their Lordships hold that the transaction was intended to be and was a mortgage by conditional sale, and they will therefore humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Solicitors for appellants : *Ranken Ford, Ford & Chester.*

Solicitors for respondent : *Young, Jackson, Beard & King.*

GNANASAMBANDA PANDARA SANNADHI (DEFENDANT) . . . . . | APPELLANT ; J. C.*

AND

VELU PANDARAM (PLAINTIFF) AND ANOTHER . . . . . | RESPONDENTS.

1899

Nov. 22, 29 ; *Dec.* 19.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Religious Endowment—Void Sale of Hereditary Trusteeship—Adverse Possession by Purchaser—Act XV. of 1877, *art.* 124—*Limitation.*

Where hereditary trustees of a religious endowment sold their hereditary right of management and transferred the endowed property :—

Held, that the sales were null and void, in the absence of a custom allowing them ; and that the possession taken by the purchaser was adverse to the vendors and those claiming under them.

Raiah Vurmah Valia v. *Ravi Vurmah Mutha*, (1876) L. R. 4 Ind. Ap. 76, followed.

Art. 124 of Act XV. of 1877, Sched. II., applies. There is no distinction between the office and the property.

The office and title being hereditary, no new cause of action accrued to the respondent on the death of his father, the vendor. To hold in favour of the successive life estates of father and son would be opposed to the ruling in *Tagore* v. *Tagore*, L. R. Ind. Ap. Supp. 47, which is applicable to an hereditary office and endowment as well as to other immovable property.

APPEAL from a decree of the High Court (Oct. 22, 1895) modifying a decree of the Subordinate Judge of Kumbakonum (Oct. 30, 1893).

The suit was brought by the first respondent against the appellant and Chockalinga, the second respondent, to establish his right to the management of an endowment connected with a temple in the Mayavaram talook and to the possession of the lands forming its endowment either absolutely or jointly with the second respondent, Chockalinga Pandaram, who was made a defendant. The original Court decreed that he was entitled to joint management and possession with this appellant. The

* *Present* : LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C.
1899

GNANASAMBANDA PANDARA SANNADHI
v.
VELU PANDARAM.

High Court declared that he was entitled to exclusive possession of the whole.

It appeared that the lands constituting the endowment of this charity had at an early date got into the possession of the Government, and when the Government disconnected itself from the administration of religious trusts these lands were handed over to Velu Pandaram and his divided nephew Kuppa Pandaram to be held and managed for the benefit of the temple. In 1868 the lands and management were held by Visalakshi, widow of Kuppa Pandaram, as mother of her infant sons, the said Chockalinga and Amrithalinga, since deceased, and by Nataraja, son of Velu Pandaram and father of the plaintiff.

On September 17, 1868, Visalakshi executed in favour of Gnanasambanda Pandara Sannadhi, of Dharmapuram, a document whereby she conveyed to him by absolute sale her hereditary right and interest appertaining to the half-share of the hereditary right of management of the charity in question. On February 13, 1869, Nataraja executed a similar deed of sale of his hereditary interest in the half-share which he was enjoying. From the date of the second document the Dharmapuram Adhinam was admittedly in exclusive and undisturbed possession of all the rights which up to that time had vested in the vendors. It was also admitted that the deeds were illegal, and could have been set aside by the vendors subject to repayment of the purchase-money.

Chockalinga came of age in 1880. The plaintiff was not born till four or five years after the sale deed by Nataraja. His father died in 1884, and he attained his majority on February 26, 1891. The main question decided in the appeal was whether under these circumstances his suit, which was brought on August 17, 1892, was barred by limitation.

The Subordinate Judge decreed that the plaintiff was entitled to joint management and joint possession with the first defendant, i.e., the appellant. In his judgment he held that the plaintiff's right of action in respect of his father's share accrued on the death of his father in 1884, and was, therefore, not barred. As regards the other half-share which had been sold by Visalakshi, he considered that his father's right to question

the validity of the deed of 1868 was barred by time, and that the bar against him must equally be a bar against the plaintiff.

From this decree both parties appealed.

The High Court dismissed the defendant's appeal, and decreed in favour of the plaintiff's appeal that the first defendant should surrender to him all the properties claimed and the entire management of the charity. In their judgment the High Court agreed with the original Court that the plaintiff's title as hereditary trustee of the half-share to which his father was entitled did not accrue till the father's death in 1884. As regards the other half, as to which the Subordinate Judge had held that time began to run against Velu Pandaram from August, 1868, the High Court said :—

"In this view of the case we are not able to agree. It appears to us doubtful in the first place whether the widow Visalakshi was able to give possession to the purchaser, though no doubt the then Pandara Sannadhi sent his men to reap the crops and set up a claim under colour of the document executed by the widow. The Pandara Sannadhi was a far more influential man than plaintiff's father, and he was consequenily able to bring pressure upon the latter and induce him to execute the deed H, that is the deed of February 13, 1869, which was a fraud upon the trust. But we do not think the evidence establishes that between September, 1868, and February, 1869, the two were in joint possession. The possession seems to have been with plaintiff's father, though efforts were made forcibly to oust him. Exhibit H states that possession was given under that document.

"There is, then, no question of the Pandara Sannadhi having acquired as against plaintiff a right by adverse possession to a joint share in the management, and the cases referred to (1) do not apply. As no limitation with respect to joint management ran against plaintiff's father, none ran against plaintiff, and, as has been pointed out above, his right to follow

(1) *Kannan* v. *Nilakandan*, (1884) Ind. L. R. 7 Mad. 337 ; *Madhava* v. *Narayana*, (1885) 9 Mad. 244 ; *Radhabai* v. *Anantrav Bhagvant*, (1885) 9 Bomb. 198, 231.

J. C. 1899

GNANASAMBANDA PANDARA SANNADHI v. VELU PANDARAM.

the property is not barred, since the suit is brought within twelve years of the accrual of the right."

Mayne, for the appellant, contended that the entire cause of action was, on the admitted facts of the case, barred by limitation. It was a suit by the son of a person entitled to the management of endowed property who had sold that right, the sale by him being of a thing which was extra commercium. It was the sale of a trusteeship which would at once have been set aside as illegal and inoperative, and whether set aside or not did not confer title on the purchaser, the appellant. The sale was of an office with the property attached, the evidence shewing that the lands were handed over as being subject to the religious trusts. It was the assignment of a trusteeship for the pecuniary advantage of the trustee, and was incompetent both under the common law of India and the usage of the foundation: *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*. (1) The sale purported to be of an hereditary office with the property attached; it could not be of a life estate, for life estates in perpetual succession are not recognised by Hindu law. The sale being void, the title continued to be vested in the so-called vendors and the possession of the so-called purchaser was adverse. In twelve years the title of the vendor and all claiming under him was barred, and in consequence extinguished: see Act XV. of 1877, ss. 2, 3, 28, arts. 124, 142, 144. The property was not inalienable. When alienated it could have been recovered on behalf of the trust under Act XIX. of 1863. This is not such a suit. It is a suit to declare title and obtain enjoyment of the thing withheld: see *Rajah Vurma Valia* v. *Kottayath* (2); *Gossamee Sree Greedharreejee* v. *Rumanlalljee Gossamee*. (3) [LORD HOBHOUSE referred to *President, &c., of Magdalen Hospital* v. *Knotts*. (4)] See further, *Balwant Rao Bishwant* v. *Puran Mal Chaube* (5) as to certain articles of limitation not applying—namely, ss. 123, 144, and 118 of Act IX. of 1871, equivalent to arts. 124, 145,

(1) L. R. 4 Ind. Ap. 76.

(2) (1873) 7 Mad. H. C. 210.

(3) (1889) L. R. 16 Ind. Ap. 137.

(4) (1879) 4 App. Cas. 324.

(5) (1883) L. R. 10 Ind. Ap. 90.

and 120 of Act XV. of 1877. An office-holder can be barred by limitation, for the office must be taken as devolving by the law of inheritance. [LORD DAVEY. Does he not rather succeed as a persona designata, designated by the law of inheritance?] Reference was then made to *Kannan* v. *Nilakandan* (1); *Karimshah* v. *Nattan Bivi* (2); *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*. (3) The plaintiff was barred in 1881. He had no hereditary right to a life interest. He takes because he is son to his father, and his right to set aside his father's assignment arose on its completion. If an infant, he could sue by guardian to declare the alienation void; though he could not claim enjoyment of the office till his father died. When the father's right was extinct, the son's right was extinguished with it. It was the same with regard to the widow's alienation. She bound the estate and, therefore, the reversioner.

Branson, for the first respondent Velu Pandaram, submitted that the suit was not barred. The High Court was right in holding that the cause of action accrued to the respondent on the death of his father, Nataraja. The right was to sue as hereditary trustee to recover possession of the whole trust property for the purposes of the endowment. His suit is to recover trust property for the purposes of the trust from the appellant, who illegally acquired the property from the plaintiff's predecessor in title, deriving it from a sale which was a breach of trust by a prior trustee, of which breach he had full notice. The son had no power to sue for that purpose till his father was dead. No right had accrued to him till then, and, therefore, no cause of action. The Limitation Act refers to the time at which the cause of action arose. This is not the case of an adverse possession; it is possession with notice of a trust. Reference was made to *Vane* v. *Vane*. (4) [LORD DAVEY. That was the case of a purchaser; an inheritor does not get a fresh start if time had begun to run against his predecessor.] The son cannot get possession till his father dies, and a right to possession was necessary in order to complete his title to sue.

(1) Ind. L. R. 7 Mad. 337.
(2) (1883) Ind. L. R. 7 Mad. 417.
(3) (1893) L. R. 20 Ind. Ap. 183.
(4) L. R. 8 Ch. 383, 397.

J. C. 1899

GNANASAMBANDA PANDARA SANNADHI v. VELU PANDARAM.

The father enjoyed during his life, or was entitled so to do, without any power to prevent his son from succeeding him. The son's title is derived from the founder, but is transmitted through the father, and is not vested till his father dies. Reference was made to *Mahomed* v. *Ganapati* (1), where it was held that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, at which time the successor first became entitled to possession: see also *Jamal Saheb* v. *Murgaya Swami* (2); *Modho Kooery* v. *Tekait Ram* (3); *Muppidi Papaya* v. *Ramana* (4); *Trimbak Bawa* v. *Narayan Bawa* (5), where it was held that in the case of endowments each member of the family entrusted with the management succeeds to it per formam doni, his right being unaffected by what his predecessor does or suffers; *Jewun Doss Sahoo* v. *Shah Kubeerooddeen* (6); *Mohunt Burm Suroop Dass* v. *Khashee Jha* (7); *Vedapuratti* v. *Vallabha* (8); *Babaji* v. *Nana* (9); *Kuria bin Hannia* v. *Gururav* (10); *Kannan* v. *Nilakandan* (11); *Karimshah* v. *Nattan Bivi.* (12)

Mayne replied.

1899

Dec. 19.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The suit in this case was brought by the respondent Velu Pandaram to establish his right to the management of an endowment connected with a temple in the Province of Madras and to the possession of the lands forming the endowment, either absolutely or jointly with the second respondent Chockalinga, and the only question in this appeal is whether the suit is barred by the law of limitation.

The earliest document relating to the endowment is dated December 19, 1850, at which time the superintendence of it

(1) (1889) Ind. L. R. 13 Mad. 277, 280.
(2) (1885) Ind. L. R. 10 Bomb. 34.
(3) (1882) Ind. L. R. 9 Calc. 411.
(4) (1883) Ind. L. R. 7 Mad. 85.
(5) (1882) Ind. L. R. 7 Bomb. 188.
(6) (1840) 2 Moore's Ind. Ap. Ca. 390.
(7) (1873) 20 Suth. W. R. 471.
(8) (1890) Ind. L. R. 13 Mad. 402
(9) (1876) Ind. L. R. 1 Bomb. 535, n.
(10) (1872) 9 Bomb. H. C. 282.
(11) Ind. L. R. 7 Mad. 337.
(12) Ind. L. R. 7 Mad. 417.

was vested in the Government. It is an agreement executed by Velu Pandaram, the grandfather of the respondent Velu, who is described as claimant to the endowment in question. It is addressed to the East India Company's Government, and states that in accordance with certain Government orders the lands attached to the endowment—which are specified—"having been delivered to my possession by Government and taken charge of by me, I shall conduct the cultivation and other affairs of the said lands from Fasli 1260, and use the income derived therefrom solely for the said temple."

On August 18, 1857, another agreement was executed by the same Velu Pandaram, by which he bound himself and his successors in the management of the endowment to act according to the conditions stated in it, and said that in default of his doing so the Government might remove him.

In 1863 the Government, then the Queen's, was engaged in divesting itself of direct responsibility for the superintendence of these religious institutions, and on October 31, 1863, an agreement was executed by the same Velu Pandaram and by Kuppa Pandaram, described as son of his elder brother, in which, after saying they are the claimants to the endowment and stating some assessments of lands belonging to it, it continues: "We shall from the current Fasli 1873 conduct properly the Pooja (worship), Naivethiam (offerings), etc., and of the temple with the said assessment amount, and also keep in the temple under our signatures a detail account of receipt and disbursements in respect of it, and pay in full the kaval revenue of the said lands to the Circar every Fasli." The former agreements were executed by Velu only, but it would appear from this last that the endowment had been held by the brothers as a joint family, and that Kuppa had succeeded as heir to his father's interest in it.

Velu died at some time, not stated, prior to 1868, leaving an adopted son Nataraja, who died in 1884, leaving the respondent Velu his son and heir, who attained majority in February, 1891; Kuppa died in 1866, leaving a widow Visalakshi and a son, the respondent Chockalinga, who attained majority in 1880.

J. C.

1899

GNANASAMBANDA PANDARA SANNADHI v. VELU PANDARAM.

On September 17, 1868, Visalakshi executed a deed of sale to the manager of another temple who was predecessor in title to it to the appellant. She is described in the deed as mother and guardian of Chockalinga and of another boy since dead, sons of the late Kuppa Pandaram, one of the two hereditary trustees. The operative part of the deed is, "I have conveyed to you by absolute sale my hereditary right and interest appertaining to the half-share of the hereditary right of management of the charity termed (describing this endowment) enjoyed by my husband until his death and afterwards by me for discharging the debts of the family incurred by my husband and myself in the mangement of the said endowment and for the maintenance present and future of myself and my little children for Rs. 2,000, the price settled therefor by mutual consent."

On February 13, 1869, a similar conveyance was executed by Nataraja of the half-share which he possessed of the hereditary right to the endowment for a like sum of Rs. 2,000 for the purpose of discharging the debts incurred in the management of the endowment.

In *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (1) this Committee held thai an assignment by the urallers (managers) of a pagoda of the right of management thereof was beyond their legal competence under the common law of India, and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in Chockalinga and Nataraja, and the possession which was taken by the purchaser was adverse to them.

The law of limitation applicable to the case is art. 124 of the 2nd schedule to the Act XV. of 1877, which says that in a suit for possession of an hereditary office the period of limitation is twelve years, which begins to run when the defendant takes possession of the office adversely to the plaintiff or any person from or through whom he derives his right to sue. Chockalinga attained majority in 1880, and had by art. 44 of the Act three years for suing to set aside the sale by his guardian. He

(1) L. R. 4 Ind. Ap. 76.

did not do so, and by s. 20 of the Limitation Act his right became extinguished. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other; but if there is, art. 144 of the same schedule is applicable to the property. That bars the suit after twelve years' adverse possession.

Nataraja also was barred, and his right was extinguished. The respondent Velu Pandaram is his son, and the suit was brought by him against the appellant and Chockalinga, who apparently had refused to be a plaintiff. The plaint states that the endowment was founded by the ancestors of Velu and Chockalinga, and it was arranged by them that only the members of their family should hereditarily hold the properties which were their family property, and from the income thereof conduct the worship and charities connected with the temple, and prayed that his right might be declared to the sole management of the temple, or, if he was held not to be entitled to the sole management, that he might be held entitled to it jointly with the appellant. The Subordinate Judge held him to be entitled jointly with the appellant; the High Court has held him to be entitled to the sole right of management.

The contention on behalf of Velu before their Lordships has been that he does not derive his right to sue from or through Nataraja; that on his death in 1884 a fresh right accrued to Velu, and the period of limitation then began. Of the many cases cited by Mr. Branson in his argument one only, *Trimbak Bawa* v. *Narayan Bawa* (1), is applicable to this contention. In that case a grant for some religious purposes had been made to one Balobha and his descendants. His estate including this grant became divisible among his sons, and the share of Vithoba, one of them, was taken in execution in 1870 and illegally sold. The sons of another son of Balobha by some process became possessed of this share. Vithoba died in 1876, never having taken any steps to recover the property, and in 1879 his son sued the other descendants of Balobha for one-third share of the management. The defence set up was that by art. 12 of the same schedule of the Limitation Act a suit to set aside an

(1) Ind. L. R. 7 Bomb. 188.

J. C.

1899

GNANASAMBANDA PANDARA SANNADHI v. VELU PANDARAM.

execution sale must be brought within a year from the conclusion of the sale. The Court held that where the founder of an endowment has vested in a certain family the management of it "each member of such family succeeds to the management, to use technical language per formam doni, and that therefore on Vithoba's death the plaintiff's right to succeed to the management in this case was quite unaffected by any proceedings against Vithoba during his life."

There is no evidence of the origin of the endowment in this suit. It must be assumed that it was by a gift from the founder. The Government appears to have considered it to be hereditary in the family by admitting Kuppa in the agreement in 1863 to share in it with his uncle. In *Tagore* v. *Tagore* (1) it was held by this Committee (2) that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law no person can succeed thereunder as heir to estates described in the terms which in English law would designate estates tail. The Hindu law of inheritance did not permit the creation of successive life estates in this endowment, and this ruling is decisive against the contention on behalf of Velu, and is contrary to the judgment in the Bombay case.

The respondent Velu can only be entitled as heir to his father Nataraja and from and through him, and consequently his suit is barred by art. 124. In their Lordships' opinion the ruling in *Tagore* v. *Tagore* (1) is applicable to an hereditary office and endowment as well as to other immovable property.

The Subordinate Judge, following the decision of the Bombay High Court, made a decree declaring the plaintiff entitled to joint management with the appellant, and ordering delivery of joint possession of the lands to him. From this decree both the plaintiff and the appellant appealed to the High Court. The appellant's appeal was dismissed on the ground that the plaintiff's right accrued on Nataraja's death. On the plaintiff's appeal the High Court varied the decree below and declared the plaintiff entitled to the sole right of management, and ordered that the possession of the properties attached to the

(1) L. R. Ind. Ap. Supp. 47. (2) L. R. Ind. Ap. Supp. 66.

endowment should be delivered to him. It has been shewn that both decrees are erroneous, and their Lordships will humbly advise Her Majesty to reverse them, and to order the suit to be dismissed with costs in both Courts. The respondent Velu Pandaram will pay the costs of this appeal.

Solicitor for appellant : *R. T. Tasker.*

Solicitors for first respondent : *Burton, Yeates & Hart.*

J. C.

1899

GNANASAMBANDA PANDARA SANNADHI *v.* VELU PANDARAM.

THAKUR SHANKAR BUKSH . . . PLAINTIFF ; J. C.*

AND 1899

BALWANT SINGH AND OTHERS . . DEFENDANTS. *Dec.* 9.

Ex parte THAKUR SHANKAR BUKSH.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Practice—Special Leave—Judgment in Review—Code of Civil Procedure, s. 626.

Reasons should be recorded by the judge under s. 626 of the Code of Civil Procedure when granting an order for review, but their absence is not ground for special leave to appeal.

THIS was a petition by the plaintiff for special leave to appeal from an order of the above Court (March 30, 1899) admitting a review from a decree of the same Court (Nov. 11, 1898), and from a decree (April 1, 1899) passed in review and dismissing the petitioner's suit, which was in ejectment.

The sole question in the suit was one of fact, whether certain plots of land within the plaintiff's talook were comprised within the defendants' sub-tenure. Concurrent findings of fact that they were not led to a decree in favour of the plaintiff by Mr. Ross Scott, the Judicial Commissioner, on November 11, 1898.

His successor in office passed the order and decree the subject of the petition, which stated that no reasons for the order of

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON and SIR RICHARD COUCH.

J. C.

1899

THAKUR SHANKAR BUKSH *v.* BALWANT SINGH.

THAKUR SHANKAR BUKSH, *Ex parte.*

review were recorded as directed by s. 626 of the Code of Civil Procedure, and submitted that the review was not authorized by c. 47, and that on the face of the judgment no sufficient reasons appeared for reversing concurrent findings of fact.

Cowell, for the petitioner, contended that special leave should be given on the ground (1.) that the order for review was an improper exercise of the jurisdiction granted by s. 623. The words "any other sufficient reason" should be construed as ejusdem generis with the particular grounds specified, and not as authorizing a general right of review where there was admittedly no right of appeal: see *Roy Meghraj v. Beejoy Gobind Burral.* (1) (2.) Under s. 626 the record of reasons was made a condition precedent of the statutory power to review.

LORD HOBHOUSE. Mr. Cowell, their Lordships wish to express in this case a regret that the learned judge who granted the review should not have put his reasons on record as required by s. 626 of the Code. They think it a matter of importance in the administration of the proceedings of the Court, and it ought to have been done. But their Lordships cannot think it a matter affecting the admission of the appeal in such a way as to induce them to advise Her Majesty to grant an appeal on that ground. It is rather a direction to the judge how to act when he has decided to grant the application than a condition of granting it. In other respects the case seems to be quite an ordinary dispute between the parties on matters of fact, matters of measurements, payments of revenue, and inferences from them; and as it is under value, the rule is that the final Code of Appeal in India should not be interfered with in its judgment. Their Lordships see no reason for taking it out of the ordinary rule that the judgment of the Appellate Court must be final.

Solicitors for petitioner: *Ranken, Ford, Ford & Chester.*

(1) (1875) Ind. L. R. 1 Calc. 197, 200.

SARDAR JAGJOT SINGH . . . . . PLAINTIFF ;

AND

RANI BRIJNATH KUNWAR . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

J. C.*

1900

Feb. 15 ; *March* 2.

Regulation XI. of 1825, *s.* 4, *sub-ss.* 1, 5—*Alluvial Lands—Title on Re-emergence.*

Land submerged by the wanderings of a river from its course, and afterwards re-emerging in a form capable of being identified, does not cease to belong to its original owner. The adjoining proprietor cannot make title to it either under sub-s. 1 or sub-s. 5 of Regulation XI., 1825, s. 4, or on any known principle.

APPEAL from a decree of the Judicial Commissioner of Oudh (Nov. 21, 1895) reversing a decree of the Subordinate Judge of Bahraich (Sept. 5, 1893) and dismissing the appellant's suit with costs.

The appellant was the owner of a one-half share of the village of Murwa, which lies to the east of the respondent's village of Randa.

It was the case of both sides that the river Ghogra until the year 1879-80 flowed from north to south through the village of Randa, save that at the south-eastern extremity of Randa the river divided the two estates.

The plaint alleged that the river Ghogra moved first in the year 1880 to the east, diluviating the south-western corner of Murwa, which reformed on the western bank of the said river adjacent to the respondent's village of Randa. That the river continued to move eastward till all the northern part of Randa which lay to the east of the Ghogra was diluviated, as were also 1314 bighas of Murwa, all of which reformed on the west of the river as an accretion to Randa. That the respondent according to custom took possession of and held such accretion until 1890, when the Ghogra, shifting to the west, rediluviated

* *Present* : LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON and SIR RICHARD COUCH.

J. C.

1900

SARDAR JAGJOT SINGH v. RANI BRIJNATH KUNWAR.

the 1314 bighas of Murwa, which reformed in situ against Murwa, and then continuing its westerly course diluviated 2058 bighas of Randa, and reformed the same on the east bank of the Ghogra in juxtaposition to Murwa as an accretion thereto by gradual accretion.

The respondent traversed these allegations, and pleaded that she had been constantly in possession of the lands in suit. The issues were : (1.) Was the land in suit annexed to Murwa by "gradual accession"? (2.) If so, ought it to be considered an increment to the plaintiff's tenure either under the particular rule laid down in clause 1, s. 4, or on the general principles of equity and justice made applicable by clause 5, s. 4, of Regulation XI of 1825.

The First Court held that the first issue was clearly proved in the appellant's favour ; and on the second that the appellant was entitled thereto under the regulation. The Appellate Court held, relying upon *Nogender Chunder Ghose* v. *Mahomed Esof* (1) and *Lopez* v. *Muddun Mohun Thakoor* (2), that the land in suit had not become annexed to Murwa by gradual accession within the meaning of the regulation, and that in consequence the judgment below must be reversed. Further, they held—(*a*) that the land in question, being admittedly a part of the estate of Randa, was not according to the decided cases land "gained" within the meaning of clause 1, s. 4; (*b*) that no issue had been raised as to the existence of an established local usage entitling Murwa to the land in question, nor had any evidence been given expressly directed to such an issue, nor were there before the Court materials to enable the Court to find such a custom.

C. W. Arathoon, for the appellant, contended that on the evidence and a right construction of Regulaiion XI. of 1825, s. 4, clauses 1 & 2, the Appellate Court should have found that the lands in suit were a gain to the appellant's village of Murwa by gradual accretion : see *Nogender Chunder Ghose* v. *Mahomed Esof.* (3) The Subordinate Judge had investigated

(1) (1872) 10 Beng. L. R. 406. (2) (1870) 13 Moore's Ind. Ap. Ca. 467.
(3) 10 Beng. L. R. 406, 428.

the case on the spot, and it was contended that his finding was right in favour of the gradual accretion. He was also right in holding in favour of the appellant's contention as to clause 5 of s. 4, that on the principles of equity and justice he was entitled to the land claimed, because on two previous occasions the respondent had taken some of his land under similar circumstances. This with other evidence was prima facie proof of a local established usage in favour of the appellant's claim. The reason why no further evidence had been given was that the respondent had set up a false case from the outset, in denying that there had been any changes at all in the course of the river. There had never been in the progress of the suit any question of reformation: the controversy had turned upon the area of the two villages changing every year owing to alluvion and diluvion, which involved gradual accretion rather than reformation.

Branson, for the respondent, was not heard.

The judgment of their Lordships was delivered by

LORD ROBERTSON. So far as the essential facts are concerned, the case of the appellant is clearly disclosed in the plaint. He claims a certain piece of land measuring 2058 bighas, and his theory is that this land has become his by alluvion. Yet, while the exigencies of pleading make him describe it as "new alluviated land," it is in this same plaint said to be "land of the defendant's" (respondent's) "village." The 2058 bighas have indeed a perfectly definite history, which in their Lordships' judgment entirely excludes the appellant's claim.

The appellant is proprietor of a village called Murwa; and the respondent is proprietor of a village called Randa. In 1866, which is the commencement of both parties' rights, the river Ghogra was flowing in a course which intersected Randa, and the portion of Randa which was on the eastern bank lay between the river and Murwa. This description, which was true in 1866, is also true now. It is the fact, however, that in the interval between 1866 and 1891 the river had first departed from and then substantially resumed the course in which it now runs, so fas as concerns those two properties. The

J. C.

1900

SARDAR JAGJOT SINGH v. RANI BRIJNATH KUNWAR.

appellant's case is entirely founded on this intervening but now obsolete history.

It appears then that, about the year 1885, the river began to work its way eastward, with the result that it came to have on the western bank of its new course not only all of Randa that had formerly been on its east bank, but also some part of Murwa. It is said, and it may be assumed, that while this situation of things lasted the disjoined part of Murwa was taken possession of by the respondent. But the Ghogra did not long adhere to this course, and soon began to recede to the west; and by 1891 it once more had to its east, not only the whole of Murwa, but (intervening between it and Murwa) the 2058 bighas now in dispute, which the appellant in his plaint admits to be historically part of Randa. For a time, during the wanderings of the river, this land seems to have been submerged; and the appellant says that it emerged "in an altered form, not capable of being identified." This disguise has fortunately not misled the appellant himself, or prevented his recognising the 2058 bighas as Randa land.

These being the facts, it is manifest that the case does not fall within the well-known chapter of law which treats of the formation of new land through the gradual and imperceptible washing up of particles by a river or the sea. Nor have we even to deal with the more complicated case, in which a piece of land is first disintegrated by water action and thereafter reintegrated or reformed by water action. The only note of similarity to alluvion to which the appellant could point was that the process of change was so far gradual; but this means merely that the river took several years to change its course. Now, the mere fact that a change in a river's course has placed land belonging to A. in contiguity to the lands of B. could never deprive A. of the lands and transfer them to B. And the proposition maintained by the appellant is by several steps nearer than this to paradox; for he contends that if after temporary aberrations a river at last leaves the land of A. in statu quo ante it must be held to be an accession to B., his next neighbour. It is superfluous to say that neither the statute law of India nor the general principles of juris-

prudence lend the slightest support to such unreasonable conclusions.

The 11th regulation of 1825, by the 1st sub-section of Section IV., declares land gained by gradual accession to be an increment of the land to which it is thus annexed; and by the 5th sub-section, in all other cases not specifically provided for in the regulaiion, where land is gained by alluvion or by dereliction of a river or the sea, the Court is to be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not by general principles of equity or justice. It is perfectly plain that neiiher the specific provision of the 1st sub-section nor the general principles of equity and justice lend the slightest support to the pretension of the appellant, which is to land that would be gained, not from the river, but from a neighbour.

So far as local usage is concerned, it is enough to say that no case of such usage is presented on record. What seems really to underlie the appellant's claim is a crude idea that, because the respondent once had possession of that part of Murwa which for the time was transferred to the west side of the river, therefore the appellant ought now to have in property the 2058 bighas belonging to Randa. No attempt was made to formulate this as a legal proposition.

Their Lordships are of opinion that the judgment of the Judicial Commissioner concurred in by the Assistant Judicial Commissioner was right; and they will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant : *T. L. Wilson & Co.*
Solicitors for respondent : *Watkins & Lempriere.*

J. C.* PADAPA BIN BHUJANGAPA . . . . PLAINTIFF

AND

1900

Feb. 16; *March* 24. SWAMIRAO SHRINIWAS AND ANOTHER . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Watan—Mortgage of Watan Property by a Trespasser—Restriction on Alienation incident to Watan Tenure.

An alienation by way of mortgage of any portion of watan property has no effect beyond the life of the watandar.

Kalu Narayan Kulkarni v. *Hanmapa bin Bhimapa*, (1879) Ind. L. R. 5 Bom. 435, approved.

The restriction is incident to the tenure, and accordingly, where a de facto watandar without legal title other than that by adverse possession mortgaged, the title of her heir prevailed over that of her alienee.

APPEAL from a decree of the High Court (Nov. 18, 1892) reversing a decree of the Subordinate Judge of Sholapur (July 27, 1889).

The issue decided in this appeal related to the validity of a mortgage executed under the circumstances stated in their Lordships' judgment by a watandar, whether it extended beyond the term of her life.

The Subordinate Judge held that the mortgage by Kalova, the watandar, was not valid beyond her lifetime, and that the appellant, who was her stepson and son to Bhujangapa the last holder, was entitled to possession of the mortgaged property as against the mortgagee defendants, and to a declaration of his title as heir.

The High Court decided that there was nothing in the sanad granted to the appellant after Kalova's death which took the property out of the well-established rule which was in force in 1865, to the effect that alienation of any watan property by way of mortgage did not operate beyond the life of the mortgagor. They agreed, therefore, with the Subordinate Judge that prima facie the appellant was entitled to recover the watan

* *Present* :—LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

lands free from any mortgage executed by his predecessor; but they added, "Here we are met by the fact that Kalova was not the incumbent of the watan, and Padapa is not her successor," because Padapa (i.e., the appellant) was, from the date of his birth, in 1848, the watandar, and Kalova, unless she was managing for him, was a mere trespasser; for as long as Bhujangapa's son was alive the Gordon settlement and the entry of Kalova's name by Government would not make her the watandar, and they concluded that, if she was a mere trespasser, then the appellant's right to recover the lands free from incumbrance had been lost by statute. They said it was unnecessary to inquire whether the mortgage was not effected on behalf of Padapa, who was, in 1865, and still is, the watandar, and they proceeded as follows :—

"But we may remark that there is good reason for supposing that, in 1865, Padapa (who was then of age) was living with Kalova, was cognizant of the mortgage, allowed Kalova to represent the estate, and acquiesced in the transaction. Certainly it is clear that from 1877 (when Kalova died) to 1881 (when Padapa quarrelled with defendants) Padapa adopted the mortgage. He admitted the status of Shriniwas as mortgagee, and Shriniwas equally admitted the status of Padapa as representative of the mortgagor.

"But apart from these considerations, regarding Kalova as a mere trespasser, Mr. Mehta, for defendants, admitted that Kalova or Kalova's heir was fully competent to redeem the mortgage. He also admitted that Kalova's heir was her stepson, the plaintiff Padapa. Assuming, as defendants contended, that Kalova fully represented the estate and purported to deal with the property as her own, and that the title of the rightful watandar was lost by limitation, in this case it so happens that the rightful watandar is Kalova's heir, and, therefore, his claim to redeem in the latter capacity cannot be resisted."

C. W. Arathoon, for the appellant, contended that the mortgage had no effect beyond the life of Kalova, the mortgagor watandar. Neither the deceased watandar nor his widow after his death could alienate absolutely. He was prohibited by

J. C.

1900

PADAPA BIN BHUJANGAPA v. SWAMIRAO SHRINIWAS.

Regulation XVI. of 1827. His widow could have no greater right. As de facto watandar or as widow, she was under disability. The circumstance of her holding adversely to the true watandar did not affect the tenure or confer upon her at the expiration of the statutory period an absolute estate, regardless of the restrictions imposed by custom or statute on the tenure and its holder. At her death the mortgagees had no title under their mortgage. The appellant had a valid title as her heir, even if he had lost his title as heir to his father. The respondents could not set up adverse possession to him, for their claim was derived from Kalova, and was not adverse to her or to the appellant in his character of her representative.

1900

March 24.

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a decree of the High Court of Bombay, dated November 18, 1892, which reversed the decree of the Subordinate Judge of Sholapur, dated July 27, 1889. The sole question is whether the appellant is entitled to possession of two villages free from any incumbrance by the respondents, or whether they have a mortgage on the property which is valid and effectual against him. The High Court decided in favour of the respondents.

The facts of the case are complicated, but, so far as material for the present purpose, are as follows :—

The villages in question form part of certain watan lands formerly belonging to Bhujangapa, the watandar. He died on September 27, 1847, leaving two widows, Kalova and Ramova. The senior widow, Kalova, was childless. The appellant is the son of Ramova, born on September 15, 1848. The legitimacy of the appellant's birth was at one time disputed, and is denied by the respondents in their statement of defence in this suit. Both Courts below agree in holding that the appellant has in previous litigation and in this suit established his status as legitimate son and heir of Bhujangapa.

Before the appellant's birth, the revenue authorities placed the watan under sequestration, and it so remained until an order was made by Mr. Gordon, President of the Special Com-

mission, on the petition of Kalova, recognising her title to the watan. This order bears date August 10, 1863, but she does not appear to have been put in actual possession until some time in 1865. No sanad from the Government to Kalova is produced, but possession was given on the terms of what is called the Gordon Settlement, which were ratified by the Bombay Act III. of 1874. By this settlement the services were commuted for one-fourth of the income, but the tenure continued to be watan.

On September 15, 1865, Kalova made the mortgage in question of the watan to Shriniwas, the father of the respondents, and she subsequently made further charges on the property in his favour. Litigation ensued between Kalova and Shriniwas, with the result that on August 31, 1875, Shriniwas was placed in possession of the property, and he was in possession at Kalova's death, which took place in November, 1877.

By an order of the Collector of Bijapur, dated April 4, 1881, the appellant was placed in possession of the revenues of the villages. But that order was reversed by an order of the Commissioner of March 20, 1886, on the erroneous ground that the prohibition against alienation of watan property did not preclude the making of a mortgage, and the respondents were by the Commissioner's order restored to possession until the appellant should bring a decree of a competent court to the contrary.

The appellant thereupon obtained from the Government a sanad, dated December 22, 1886, whereby the villages were conferred upon him subject to a fixed annual payment in lieu of services, and it was provided that the said lands and cash allowances should be continued without demand of services and without increase of land tax over the above fixed amounts, and without objection or question on the part of Government as to the rights of any holders thereof so long as any male heir to the watan, lineal, collateral, or adopted within the limits of the watandar family, should be in existence.

The present suit was commenced by the appellant on August 16, 1887, against the respondents, who are the two sons of Shriniwas, now deceased. The prayer of the plaint so

J. C.

1900

PADAPA BIN BHUJANGAPA v. SWAMIRAO SHRINIWAS.

far as material was for an order that the villages in suit, being in the nature of watan property, the mortgage was not binding after the death of Kalova, and for possession.

The material defences were—(1.) that the villages were not watan property ; (2.) that Kalova's and their own possession under a title derived from her had been adverse, and so the suit was barred by limitation.

The Subordinate Judge, in his judgment dated July 27, 1889, found—(1.) that the cause of action arose in the month of February, 1886 ; (2.) that the property was watan and consequently not liable for the debt (even if proved) after Kalova's death ; and (3.) that the appellant was entitled to possession. Accordingly, the Subordinate Judge made a decree that the appellant should recover possession, and that the investigation of mesne profits be reserved—all costs on the respondents.

The respondents appealed to the High Court. By their judgment the learned judges held that the property was watan, and there was nothing in the sanad granted to the appellant to take the property out of the well-established rule (which was in force in 1865, when the mortgage to Shriniwas was executed) that alienation by way of mortgage of any portion of watan property had no force beyond the life of the watandar mortgagor. They referred to the case of *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa.* (1) It was there held that a mortgage by a watandar of watan property executed in 1871, when Regulation XVI. of 1827 was yet in force, was in its inception void against the heir of the watandar, and did not become validated against the heir by reason of the repeal of that regulation by Act III. (Bombay) of 1874. Their Lordships agree with that decision, and think it is directly applicable to the present case.

The learned judges, therefore, held that prima facie the appellant (if the successor to Kalova) was entitled to recover the lands free from any mortgage executed by his predecessor. But they considered that Kalova was not the incumbent of the watan, and the appellant was not her successor. Having established his legitimacy, he was the watandar from the date

(1) Ind. L. R. 5 Bomb. 435.

of his birth, and Kalova was a trespasser. It followed that his title to recover the lands free from any incumbrance on the ground that he is the watandar has been lost by limitation. True he is also the heir of Kalova, but in that character his only right was to redeem Kalova's mortgage.

It may be usual to recapitulate the material dates in the case. The appellant was born on September 15, 1848, and therefore attained his majority on Sepiember 15, 1866. Kalova died in November, 1877. At her death, therefore, the appellant was not barred from asserting his original title as heir of Bhujangapa. But on September 15, 1878, it would seem that he became barred, and his title as son and heir of Bhujangapa was extinguished. Thereupon Kalova's heir would prima facie be entitled to the watan, and if he found other persons in possession also claiming under Kalova, he could maintain an action against them in which their title as against him would be determined. The question would then come to be who has the best title through Kalova, she being assumed to have been the rightful owner of the land. If the persons in possession did not claim under Kalova but were independent trespassers, other considerations would arise.

Unfortunately their Lordships had not the advantage of hearing counsel for the respondents in support of the ingenious argument which found favour in the High Court. But giving it their best consideration, they think it errs in leaving out of sight the incidents of the tenure and Kalova's true position.

Assuming that the appellant was barred by limitation from recovering the lands as heir of his father from those claiming under Kalova, and consequently his title as watandar from his own birth was extinguished, that circumstance did not alter the tenure. The lands remained watan, and Kalova was watandar de facto with all the rights and subject to all the restrictions incident to that tenure. In the order of Mr. Gordon, under which Kalova obtained possession, it was conferred on her as watan, and in the mortgage made by her the lands are described as watan. And in all the proceedings in the Collector's office she is recognised as watandar. It is clear, therefore, that she

J. C. 1900

PADAPA BIN BHUJANGAPA v. SWAMIRAO SRINIWAS.

held possession as watandar and in no other character. Consequently she could not make any alienation which would be valid against her own heir whether that heir were the appellant or another. And on the assumption that the appellant's earlier title is extinguished by limitation, there is nothing to preclude him from asserting his title as Kalova's heir. The argument seems to give greater right to possession as watandar by wrong or usurpation than would be enjoyed by a rightful watandar.

The learned judges seem also to have thought that the appellant had in some way adopted the mortgage.

Their Lordships think the evidence insufficient to support this finding. But it is unnecessary to discuss this topic further, because if the mortgage was void against the appellant and not merely voidable, no amount of acquiescence short of the period of limitation would give it validity as against the appellant.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court should be reversed, and instead thereof the appeal to that Court should be dismissed with costs. The respondents must also pay the costs of this appeal.

Solicitors for appellant; *T. L. Wilson & Co.*

SAH LAL CHAND . . . . . DEFENDANT;

AND

INDARJIT . . . . . PLAINTIFF.

J. C.*

1900

Feb. 15;
March 24.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Indian Evidence Act, s. 92—*Recital in Sale Deed of Payment of Purchase-money —Oral Evidence admissible to contradict Recital—Proof of Collateral Agreement.*

Sect. 92 of the Indian Evidence Act does not preclude oral evidence to contradict a recital of fact in a written contract.

It is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid :—

Held, in this case, that the vendor might prove a collateral agreement that the purchase-money should remain with the purchaser for a specified purpose.

APPEAL from a decree of the High Court (June 2, 1896) reversing a decree of the Subordinate Judge at Agra (June 13, 1893).

The suit was brought to recover from the appellant the sum of Rs. 33,133 5*a*. 3*p*., as the balance of the amount of consideration for a sale deed dated February 18, 1888.

The first Court dismissed the suit, but the High Court decreed the respondent's claim with costs.

The plaint, which was filed on December 6, 1892, narrated that the respondent was sole heir to Jiva Ram, deceased, and had become entitled to possession of all his estates on the death of his widow Incha Kuar, that the widow had affected to dispose of the estate by will in favour of persons who had gained possession thereof, and alleged in its 4th paragraph that, in order to defray the costs of the litigation thereby rendered necessary and other incidental expenses, the respondent had sold to the defendants, Sah Lal Chand and Kesar Kuar, by a sale deed dated February 18, 1888, half of the said estate for Rs. 30,000, the price to remain in deposit with the defendants, who, it was agreed, were to join the respondent in a suit to

**Present*:—LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C.

1900

SAH LAL CHAND v. INDARJIT.

recover the whole estate, defray the whole costs thereof, and, after deducting the respondent's moiety from the said price in deposit, pay the balance thereof to the respondent, after obtaining a decree in ejectment from the First or Appellate Court.

It being common ground between the parties that the sale consideration was Rs. 30,000, and that the same was produced, and changed hands, before the Registrar, the issue of fact was solely whether it was actually paid down at the date of the deed, or whether the real arrangement was that it was to be paid on the recovery of the property, less the respondent's share of the costs of recovery.

The Subordinate Judge dismissed the suit, on the ground that the plaintiff had not proved an agreement to defer payment till after the recovery of the property; for, if made, it ought to have been reduced to writing; nor had he proved the return of the money to the defendants after registration. He found, contrary to the pleadings and evidence of both parties, that the real agreement was one "for engaging in litigation, the defendants, in consideration of their defraying the expenses of that litigation, to have half the property."

The High Court found that the case for the plaintiff was proved. There was no sufficient reason for disbelieving his witnesses. His case was consistent with probabilities, and the finding of the Subordinate Judge was opposed to the evidence on both sides, and improbable. They considered the genuine and undisputed account-books produced by the defendants to be decisive on the real issue between the parties. The items making up the Rs. 30,000 were absent from those accounts, and no sufficient explanation of their absence was given.

Ross, for the appellant, contended that the High Court erred in admitting evidence of an oral agreement which contradicted and varied the terms of the registered sale deed. Sect. 92 of Act I. of 1892 rendered such oral evidence inadmissible. It was, moreover, unworthy of credit when admitted.

Cowell, for the respondent, contended that the evidence admitted in this case did not vary the terms of the deed and was within the meaning of s. 91 of the Act, explanation 3

and s. 92, provisoes 1 and 2. It was settled law that a recital as to payment of consideration money in a sale deed was not conclusive, but could be contradicted by proof of the actual transaction: see *Hukum Chand* v. *Hiralal* (1); *Lala Himmat Sahai Singh* v. *Llewhellen*. (2)

Ross replied.

The judgment of their Lordships was delivered by

LORD DAVEY. In this case the respondent sued the appellant and another person for a sum of Rs. 33,133 5*a*. 3*p*. alleged to be due to the respondent as the balance of the consideration for a certain sale deed dated February 18, 1888.

The First Court dismissed the suit, but on appeal the High Court of Allahabad, by its decree dated June 2, 1896, reversed the decree of the Subordinate Judge, and gave judgment for the respondent with costs.

By the sale deed in question, after recitals that the respondent became entitled on the death of his maternal grandmother to the estate of his maternal grandfather, Jiwa Ram, but strangers had got possession of the estate, and the respondent had not the necessary means of prosecuting a suit against them, and that he had therefore sold a moiety of the property for Rs. 30,000, as to six annas to Sah Lal Chand and as to two annas to Mussammat Kesar Kuar, and that he had received the entire consideration with reference to the share of each vendee in the manner detailed below, it was agreed that the vendees should institute a claim in the Court of the Subordinate Judge of Agra District jointly with the respondent to recover possession and enter into possession of the property decreed jointly with him and take mesne profits of their share. And the respondent agreed that after the institution of the suit he would not make any settlement with respect to the subject-matter of the claim, or withdraw the claim or get the case settled by arbitration without the consent of the vendees. If the decision of the Court should be unfavourable, the respondent was to bear the costs of the opposite party, and repay the consideration and be responsible for the costs incurred.

(1) (1876) Ind. L. R. 3 Bomb. 159. (2) (1885) Ind. L. R. 11 Calc. 486.

J. C. 1900

SAH LAL CHAND v. INDARJIT.

The consideration money of Rs. 30,000 was stated to have been received from the vendees in the following manner :—

	Rs.
Received in cash at time of registration . .	25,000
By set-off against a previous debt due in respect of five rukkas	3,000
Caused to be paid Chandi Parshad and Jagan Parshad	2,000
	30,000

In May, 1888, the respondent brought a suit for the recovery of Jiwa Ram's property jointly with the appellant and Kesar Kuar, and a decree was made in their favour by the Judge of First Instance, which was affirmed by the High Court on May 26, 1891. They subsequently executed the decree and obtained possession of the property.

By his plaint in the present suit, which was filed on December 6, 1892, the respondent alleged that the three items in which the consideration of the sale deed was said to have been paid were fictitious, and that the money which was produced at the time of registration went back to Sah Lal Chand, and no item was due from the respondent under old accounts, nor was anything paid on respondent's behalf to Chandi Parshad and Jagan Parshad. And the respondent alleged that the sale consideration was left with the vendees subject to the condition that the vendees should bear half the costs of the proposed suit and defray the other half (i.e., the respondent's share) out of the consideration money, and after obtaining a decree in the First or the Appellate Court pay the respondent the balance (if any). The respondent named the expiry of the time allowed for an appeal to Her Majesty on January 15, 1892, as the date of accrual of cause of action.

The appellant by his written statement denied the facts alleged by the respondent and pleaded that the claim was barred by time.

Both Courts have agreed that no part of the consideration money was paid to or on account of the respondent, and their Lordships need not say more on that subject than that they

agree with the finding. The Subordinate Judge, however, held that the respondent had not made out by evidence the agreement alleged by him, and his suit must therefore fail. The High Court, on the other hand, held that the respondent's story was in accordance with the probabilities of the case, and was sufficiently proved by the evidence adduced by him. In this case no question of limitation arises.

The learned judges have very fully and carefully stated and commented on the evidence of the respondent and his witnesses. Their Lordships agree with the conclusions of the learned judges on the question of fact and with the reasons which they have given for accepting the respondent's story as true.

The point which was chiefly pressed on their Lordships by the learned counsel for the appellant was also raised in the High Court and considered by the learned judges—namely, that no evidence should have been received of the agreement alleged by the respondent, because it varied or contradicted the written contract, and was therefore inadmissible under s. 92 of the Evidence Act. Their Lordships, agreeing with the High Court, regard it as settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vender to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied, &c. The contract was to sell for Rs. 30,000, which was erroneously stated to have been paid, and it was competent for the respondent, without infringing any provision of the Act, to prove a collateral agreement that the purchase-money should remain in the appellant's hands for the purposes and subject to the conditions stated by the respondent. This objection, therefore, fails.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant will pay the costs of it.

Solicitors for appellant : *Pyke & Parrot.*
Solicitors for respondent : *Barrow & Rogers.*

J. C.* YEO HTEAN SEW . . . . . PLAINTIFF;

1900

AND

Feb. 15; *March* 24. ABU ZAFFER KOREESHEE . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Mortgagor—Construction—Covenant to pay Monthly Interest.

Where a mortgagor covenanted to pay a fixed sum at the expiration of a year with interest at the rate of 10 per cent. per annum, and in default with interest at the same rate until actual repayment, and that he "will pay all such interest month by month":—

Held, in a suit brought before the due date of the mortgage, that, by the true construction of those words, and, having regard to clauses in the deed which contemplated interest becoming due and in arrear before that date, monthly interest was payable from the execution of the deed.

APPEAL from a decree of the above Court (May 16, 1899) dismissing the appellant's suit with costs on the ground that it was premature.

The suit was brought under a deed of mortgage, the material clauses of which are set out in their Lordships' judgment. The due date of the mortgage was October 22, 1899; the date of suit was January 13, 1899.

The appellant contended that under clause 4 there had been default in payment of interest which entitled him to sue; the respondent contended that the provision in clause 4 was on its true construction a penalty from which he was entitled to relief.

The Recorder ruled in accordance with the respondent's contention. He said: "It is true that clause 4 contemplates default by the mortgagor in payment of interest due under the deed before October 22, 1899, but as there is no covenant or stipulation by him for payment of mesne interest, I think he is entitled to contend and to contend successfully that the suit is premature. Great reliance has been placed by plaintiff's

* *Present*: LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

Counsel on *Prosad Dass Dutt* v. *Ramdhone Mullick* (1), but it is clear from the opening words of the judgment of Peacock C.J. that it can be plainly distinguished from this case in that the deed under consideration contained a covenant that the mortgagor would on September 4, 1866, pay or cause to be paid to the mortgagee, his executors, administrators, representatives, and assigns, the sum of Rs. 23,000, and would also in the meantime pay interest for the same, so that, as the learned Chief Justice pointed out, it was clear that interest was to be paid between the date of the deed and the time fixed for payment of the principal. In the deed before me there is no such stipulation, and it would only be by reading a clause into the deed that is absent that this case could be rendered identical with *Prosad Dass Dutt* v. *Ramdhone Mullick* (1), and the plaintiff be entitled to a decree."

Fox, for the appellant, contended that the Recorder had misconstrued the deed of mortgage. On its true construction interest was payable month by month from the date thereof. Any other construction would render clauses 4 and 9 insensible and of no effect. These latter contemplate interest being due before October 22, 1899, and also that default could be made before that date, which clearly pointed to the intention of the parties that interest should become due month by month from the execution of the deed. Moreover, the respondent by his pleadings and conduct shewed that he so understood it.

The respondent did not appear.

1900
March 24.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. By a mortgage deed dated October 22, 1898, the respondent, in consideration of Rs. 75,000, granted certain lands in Rangoon to the appellant subject to a proviso for redemption by payment on October 22, 1899, of Rs. 75,000, with interest after the rate of Rs. 10 per cent. per annum computed from the date of the deed and payable as thereinafter

(1) (1866) 1 Indian Jurist, 255.

J. C.

1900

YEO HTEAN SEW *v.* ABU ZAFFER KOREESHEE.

provided. The mortgagor covenanted with the mortgagee as follows :—

"3. That the mortgagor will, on the 22nd day of October, 1899, pay to the mortgagee the sum of Rs. 75,000, and will also pay interest for the same after the rate of Rs. 10 per cent. per annum computed from the date of these presents. And if the said sum of Rs. 75,000 shall not be paid on the said 22nd day of Ociober, 1899, then the mortgagor will pay to the mortgagee interest thereon after the rate aforesaid until the same shall be fully paid and satisfied, and will pay all such interest month by month on the 22nd day of each month succeeding that for which it shall become due.

"4. That if before the said 22nd day of October, 1899, the mortgagor shall make default in payment of the interest due hereunder for one calendar month after becoming due, then in that case the principal sum of Rs. 75,000 and interest shall thereupon become due and payable."

On January 13, 1899, the mortgagee brought a suit against the mortgagor, alleging in his plaint that the mortgagor had only paid Rs. 200 for over two months as interest, and thereby failed to comply with the requirement of clause 4 of the mortgage deed, and that the sum of Rs. 76,508 was due for principal and interest on the mortgage, and praying for an order to the defendant to pay that sum on a day to be named by the Court, and in default that the mortgaged premises might be sold and the proceeds applied in payment.

The defendant by his written statement admitted the allegations in the plaint, and submitted that the provision in clause 4 was a penalty which the plaintiff was not entitled to enforce and that the suit was premature. The suit was tried by the officiating Recorder of Rangoon, who on May 16, 1899, dismissed it. He held that the provision in clause 4 did not create a penalty—in which their Lordships agree with him—but as there was no covenant or stipulation for payment of "mesne interest" by the mortgagor the suit was premature. The mortgagee has appealed, and the question to be determined is whether the mortgage deed contains such a covenant.

In clause 3 the mortgagor covenants that he will, on

October 22, 1899, pay the principal sum with interest computed from the date of the deed, and if the principal shall not be paid on Octoher 22, 1899, that he will pay interest thereon after the same rate until the principal shall be fully paid. Then follow the words, and "will pay *all such interest* month by month on the 22nd day of each month succeeding that for which it shall become due." According to strictly grammatical construction, "such" would refer only to the interest payable after October 22, 1899, but it is capable of meaning the interest for the previous year covenanted in the first part of the clause to be paid, or it may be considered to mean interest at the rate fixed. If it does not mean the interest in the first part of the clause, no part of the first year's interest would be payable until the end of that year, although after that time the interest is to be paid month by month. It is not reasonable to suppose that the mortgagee would agree to this. Then the introduction of the word "all" is not without significance. If the concluding words of the clause were meant to apply only to the part which immediately precedes them, "all" is unnecessary. Combined with "such" it helps to shew what is meant, and that the clause should be read as one sentence and not as if the first part is separate from what follows it. Clauses 4 and 9 of the deed support this construction. Clause 4 assumes that there is an obligation to pay interest before October 22, 1899. If there is not, there cannot be default before that day in payment of the interest, and the clause can have no operation. Clause 9, which provides that if at any time either before or after October 22, 1899, the interest due under the mortgage is in arrear to the extent of Rs. 500 and unpaid for three calendar months after becoming due it shall be lawful for the mortgagee to sell the premises, also assumes that there is a covenant to pay interest at some time during the first year, otherwise the interest could not be in arrear before October 22, 1899. The construction which their Lordships put upon "all such interest" makes the different clauses in the deed consistent, and they are of opinion that the suit ought not to have been dismissed. They will therefore humbly advise Her Majesty to reverse the decree

J. C.

1900

YEO HTEAN SEW
v.
ABU ZAFFER KOREESHEE.

appealed against and to order that upon the defendant paying to the plaintiff within six months from the date of Her Majesty's order the sum of Rs. 75,000, the principal, and Rs. 1,508, the interest due on the mortgage mentioned in the plaint, together with the costs of this suit in the Recorder's Court as taxed by the Court, and further interest on the said principal at the rate of Rs. 10 per cent. per annum from the date of institution of suit—namely, January 13, 1899—till payment, the plaintiff do reconvey to the defendant the said mortgaged premises free and clear from all incumbrances made by him, and do deliver up to the defendant all deeds and writings in his custody or power relating thereto; but in default of the defendant paying to the plaintiff such principal interest, costs, and further interest as aforesaid, by the time aforesaid, that the said mortgaged premises be sold, and the money to arise by such sale be paid into court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, costs, and further interest as aforesaid, and the balance (if any) shall be paid to the defendant; but if the proceeds of sale shall not be sufficient for the payment in full of such principal, interest, costs, and further interest, then that the defendant do pay to the plaintiff the amount of such deficiency with interest thereon at the rate of 6 per cent. per annum until such payment. The respondent will pay the costs of this appeal.

Solicitors for appellants : *Hopgoods & Dowson.*

FATIMATULNISSA BEGUM AND OTHERS. . PLAINTIFFS; J. C.*

AND 1900

SOONDER DAS AND OTHERS . . . . . DEFENDANTS. *Feb.* 26; *March* 24.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Usufructuary Mortgage—Suit by Mortgagors for Possession—Act XIV. of 1859, *s.* 1, *cl.* 15—*Acknowledgment—Estoppel.*

A mortgagor's suit for possession under a usufructuary mortgage dated October 17, 1788, is barred on October 17, 1848, by Act XIV. of 1859, s. 1, cl. 15, unless brought before January 1, 1862, or unless previous to October 17, 1848, an acknowledgment of the mortgage in terms of that clause is given, signed by the mortgagees or some person claiming under them.

A grant after 1848 of a lease of part of the property in suit to the mortgagor by the mortgagee describing himself as usufructuary mortgagee does not revive an extinct right and does not preclude the lesser from asserting his true title, nor does it amount to a representation which he is bound to make good, not being an essential part of the contract of lease.

Citizens' Bank of Louisiana v. *First National Bank of New Orleans*, (1873) L. R. 6 H. L. 360, followed.

APPEAL from a decree of the High Court (June 16, 1896) reversing a decree of the Subordinate Judge of Shahabad (March 30, 1894), and dismissing the appellants' suit as barred by the Statute of Limitations.

The suit was brought by the appellants on February 20, 1893, as representing the estate of Syed Nurad Hossein Khan, against the respondents as representing the estate of Sadhu Ram, to recover property delivered by the former to the latter on usufructuary mortgage in 1788. The plaint alleged that the mortgage was not finally satisfied till 1881. They prayed that possession might be awarded to them either at once if the debt was satisfied, or upon payment of the amount which might be found to be still due.

The respondents pleaded limitation, having regard to the facts stated in their Lordships' judgment.

* *Present* :—LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, AND SIR RICHARD COUCH.

J. C.

1900

FATIMATUL-NISSA BEGUM *v.* SOONDER DAS.

The Subordinate Judge decreed in favour of the appellants. He said there was no doubt that the mortgage was satisfied by enjoyment of the usufruct of the mortgaged property. The date at which it was satisfied he considered to be in 1830. As to the plea of limitation, he said, "It is abundantly clear that the contesting defendants and their predecessors were never in adverse possession, but they are in possession as mortgagees, and the title of the plaintiffs' predecessors as proprietors was acknowledged."

The High Court dismissed the suit as being barred by Act XIV. of 1859, s. 1, cl. 15. They considered that the statute ran from the date of the document in October, 1788, that the sixty years expired in 1848, and that the suit was barred in 1862. They considered that no acknowledgment subsequent to 1848 was material, and they held that the pleadings in the previous suits contained nothing which could be held to be an acknowledgment to bar the statute. They recorded no finding as to when the mortgage debt was satisfied.

Haldane, *Q.C.*, and *Mayne*, for the appellants, contended that there was no evidence to support the finding of the First Court that the mortgage had been satisfied in 1830 or at any other time beyond sixty years from suit. So long as the right to hold under a usufructuary mortgage continued, which right lasted until the mortgage was satisfied, Limitation Acts could not apply. Reference was made to Act XIV. of 1859, s. 1, cl. 15, s. 18; Act IX. of 1871, Sched. I., art. 148; Act XV. of 1877, arts. 148 and 149 of the schedule, and s. 19. The High Court was wrong in holding that there had been no acknowledgment of the mortgagor's title by the mortgagee, even if the cause of action had accrued more than sixty years before suit. The appellants relied especially on a respondent having described himself as usufructuary mortgagee in a lease which he had executed in 1872 of part of the mortgaged property to one of the mortgagors. It was an acknowledgment of title signed by the party, and estopped the mortgagee from afterwards repudiating that character, which involved an admission of the mortgagor's

title : see *Luchmee Buksh Roy* v. *Runjeet Ram Panday*. (1) [LORD HOBHOUSE. You must shew an acknowledgment within sixty years from the date of the deed.] The Act did not operate an extinguishment of title. On the admissions the title continued to exist.

Cohen, Q.C., *Branson*, and *G. Branson*, for the respondents, referred to Regulation XV. of 1793, and contended that thereunder the title of the appellants was extinguished before the Limitation Act of 1859 came into force. Assuming that the Act of 1859 applied, the High Court rightly held that there was not shewn to have been any writing signed by the mortgagee or some person claiming under him which could give a fresh date from which the period of limitation is to be reckoned. Limitation accordingly ran from 1788.

Haldane, Q.C., replied.

The judgment of their Lordships was delivered by

1900
March 24.

LORD HOBHOUSE. The plaintiffs below, now appellants, are the representatives in estate of one Nurud Hossein Khow, who, on October 17, 1788, effected a usufructuary mortgage of the property now in dispute along with other property to secure the sum of Rs. 1,05,783 due on bonds to three several persons. One of the mortgagees was named Sadhu Ram, to whom one of the bonds was owing. In some way not now apparent a settlement was made in or about the year 1806, by virtue of which the other creditors were satisfied and fourteen annas of the property released. A two-anna share remained as a security to Sadhu Ram, but on the terms of the original mortgage adjusted to the division of interests. It will be convenient to speak of the parties and their successors respectively as mortgagors and mortgagees. The terms of the mortgage are as follows : "Until the whole and entire sum, the principal aforementioned and interest thereon, whatever that may be by account, is not repaid to the aforenamed persons, the said villages shall remain in the possession and enjoyment of the aforenamed persons ; they will year by year take the proceeds thereof, and then give, without objection, receipt annually for Rs. 6,201, in part payment of the

(1) (1873) 13 Beng. L. R. 177 ; S. C. 20 Suth. W. R. 375.

J. C.

1900

FATIMATUL-NISSA BEGUM v. SOONDER DAS.

aforementioned debt. They will with confidence keep cultivating the aforesaid mouzahs. If there be an increase in the proceeds derived from the villages, or if there be a decrease, which God forbid, they will take the profit and loss on themselves. I have and will have by no means any concern with the increase or decrease."

In the year 1817 the mortgagees, having been dispossessed by the morigagors, sued for possession of their two-anna share, and the Court granted them a decree on that footing, adding that, if the defendants have any objection as to the money of the usufructuary mortgage having been liquidated, they are at liberty to bring a separate suit.

The morigagors did bring a suit accordingly in the year 1819, praying for possession of the land and return of their bonds on the ground that the mortgagees had been overpaid. By the decree of the District Judge dated October 3, 1820, it was found that the mortgagees had not been paid; and the suit was dismissed, but with some directions for the final payment in liquidation of the mortgage and for the restoration of the land in the year 1231 Fusli (A.D. 1824 or thereabouts). This litigation was continued by appeals to the Provincial Court, and thence to the Sudder Dewani Adawlat. On August 27, 1833, a final decree was passed, finding that the mortgagees were not paid and dismissing the mortgagors' appeal. The mortgagees have been in possession ever since.

On February 20, 1893, the present suit was commenced by the mortgagors, who allege that the whole debt was discharged in 1288 Fusli (A.D. 1881), and pray for possession and other relief. It is not necessary to consider any other defence than that of bar by time.

The earliest law which placed a limit of time upon suits by mortgagors to recover the mortgaged property is Act XIV. of 1859. It was thereby provided (s. 1, cl. 15) that no suit shall be maintained against a mortgagee of immovable property for recovery of the same unless it is instituted within sixty years from the time of the mortgage; or, if in the meantime an acknowledgment of the title of the mortgagor or of his right of

redemption shall have been given in writing signed by the mortgagee or some person claiming under him, from the date of such acknowledgment in writing. This Act remained in force till repealed by the Limitation Act of 1871. By s. 18, coupled with a subsequent Act XI. of 1861, suits instituted before January 1, 1862, were to be determined as if the Act had not been passed.

According to the terms of this law, suits by the mortgagors of 1788 were barred on October 17, 1848, unless in the meantime the required acknowledgment was given. Their right to sue was kept alive till 1862; but as they did not sue, the Act remains unqualified by that proviso.

The Act of 1871 provided the same limits of time for suits of this kind, and it added the provision (s. 29) that at the expiration of the period thereby limited to any person for instituting a suit for the possession of any land his right to such land shall be extinguished. The period thereby limited in the case of this mortgage was October 17, 1848, and the title of the mortgagors was extinguished on that day unless they can shew a previous acknowledgment in writing.

The Subordinate Judge decided in their favour on this point. He relied on the proceedings in the suits of 1817 and 1819. The records had been destroyed in the Mutiny, but the mortgagors produced copies of the decrees which recited the pleadings. The plaint in the earlier suit and the written statement in the later asserted the title of the mortgagees as such. The Subordinate Judge considered that he was bound to presume that these pleadings were signed by the mortgagees because the law required them to do it. The High Court, however, point out that there was no such law then existing; plaints might be and were signed by Vakils, and written statements did not require any signature at all. Therefore there could be no presumption that any such acknowledgment as the Acts of 1859 and 1871 require was given by the morigagees.

These pleadings constitute the only ground for alleging that prior to October 17, 1848, any written acknowledgment of title was given by the mortgagees to the mortgagors. As this ground fails, it follows that as from October 17, 1848, the right

J. C. 1900

FATIMATUL-NISSA BEGUM v. SOONDER DAS.

of the mortgagors to sue was barred by force of the Act of 1859, and their right to the land was extinguished by force of the Act of 1871.

The Subordinate Judge also relies on a number of transactions which go to shew that the mortgagees considered that they still retained that character. In that character they applied for mutation of names in the Collectorate Register, and they granted leases, and they gave receipts for rent. The High Court did not think it necessary, nor do their Lordships, to examine those transactions in detail. Only one took place prior to the extinction of the mortgagors' title in 1848, and that is an application for mutation of names in 1839, which was not an acknowledgment made to the mortgagors, but only an official proceeding to substitute the successor of a mortgagee for his predecessor under the title which then actually existed.

Only one of these transactions has been seriously insisted upon during the present argument. On January 8, 1872, Beni Prashad, a mortgagee, granted to Makbul Fatima, a mortgagor, a lease of the mortgaged property, or part of it, for a term of ten years. In this grant the lessor is described as usufructuary mortgagee. This is not now put forward as an acknowledgment which gave a new starting point of time for limitation. But Mr. Haldane contended that it estopped the mortgagee from repudiating that character in a litigation with the mortgagor. If the lessor were seeking to impeach the lease on the ground that he was not usufructuary mortgagee he would be estopped. But the lessee had the full benefit of the lease, and for matters outside the lease it contains nothing to preclude the lessor from asserting his true title.

But it is further contended that this description of the lessor amounts to a representation which he is bound to make good. In order to succeed on this ground the mortgagors must shew that the description of the lessor was an essential part of the contract, that the lessee made the contract in reliance on those terms, and that her position was in some way altered by the terms in which her lessor spoke of himself: see *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans and*

Others. (1) Unless the lessee could shew at least so much she would have no foundation for contending that her extinct right was revived, or rather re-granted, by the terms of the lease. In effect what is asserted for her is the creation of a new right. But there is not a vestige of evidence for any such case, nor any reason to believe that the description of the lessor was anything but a mere continuance of the description by which the mortgagees were entered as proprietors in the collector's books in 1839.

The case is a singular one. Probably the time at which the title of the mortgagors to sue became extinct or at which their right was barred was not clearly present to the minds of the mortgagees, or indeed of either party. But that does not prevent the operation of the law which lays down fixed rules for the bar of suits by time. The High Court have rightly interpreted it, and their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Watkins & Lempriere.*

(1) L. R. 6 H. L. 360.

J. C.* 1900

Feb. 14 : *March* 24.

GIRISH CHUNDER LAHIRI . . . . . PLAINTIFF;

AND

SHOSHI SHIKHARESWAR ROY . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mesne Profits—Rents which might have been recovered by ordinary Diligence—Dakhilas—Report of Amin—Admission of further Evidence—Interest.

Where a decree in ejectment directs that mesne profits be ascertained :—

Held, that, according to the true construction of s. 211 of the Civil Procedure Code, the account should include whatever rents according to the prevailing rates the defendants might have recovered by ordinary diligence in respect of the lands decreed.

In taking the account dakhilas are frequently important but not necessary evidence.

The report of an Amin appointed to conduct a local inquiry as to mesne profits is made evidence by s. 393 of the Code, and it would defeat the object of local investigation if it were set aside and a fresh investigation made by the Court as a matter of course. New evidence should not be given without the leave of the Court.

The expression "mesne profits" in a decree includes interest thereon (see s. 211 of Civil Procedure Code of 1882), but may not be allowed for any time later than three years from date of decree.

APPEAL from a decree of the High Court (Feb. 20, 1894) reversing an order of the Subordinate Judge of Rajshahye (March 31, 1892), and remanding the case to him to be disposed of in accordance with the principles laid down by the High Court. The questions for decision included the principle on which an account of mesne profits of lands decreed should be taken in the execution department, and the procedure to be observed in regard to local investigation and subsequent action by the Courts.

Rajah Bireswar Roy died many years ago and left two sons, the elder, Shikhareswar, who died in 1865, leaving one son, the respondent, and the second, Maheshwar, who died in 1873, and is represented by his three surviving sons, Tarakeswar, Biseswar, and Kasiswar, who were defendants in the original

* *Present* : LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

suit, but were not parties to this appeal. He also left a daughter, Baroda Soondari, since deceased, who adopted the appellant.

Bireswar Roy and his wife Joy Soondari made from time to time various grants of properties to Baroda Soondari, and the suit of the plaintiff in which this execution proceeding arose related to those properties.

After his death the estate of Rajah Bireswar Roy was taken charge of by the Court of Wards on behalf of his minor grandsons. In 1882 the plaintiff instituted a suit against them and the Manager of the Courts, on the allegation that on April 12, 1873, he had been dispossessed by the Court of Wards of the properties which he had received from Baroda Soondari. He obtained a decree on December 22, 1883, and in execution obtained possession of all the properties in 1885 except Nyadiar, which was not recovered till 1892.

On January 8, 1890, an application for mesne profits for three years before suit, and from thence until delivery of possession, was filed by the decree holder. A Civil Court Amin was appointed, and on February 14, 1890, an order was passed by the Subordinate Judge laying down the following rules for his guidance :—

1. What will be the amount of mesne profits of the decreed land from the year 1286 to the month of Bhadro, 1289 ?

2. What quantity of crops could with due diligence have been grown during the period of dispossession on the lands which were in the nij cultivation of the decree holder in villages Harifala and Sabrul before the period of dispossession, and what would be the value thereof at the bazar rate ?

3. Whether any portion of the lands decreed lay waste during the time of the plaintiff's possession ; if so, what was its quantity and what was the rate of rent ; and if any land lay waste during the time of the judgment debtors' possession, what was its quantity and what its rate of rent ; and whether the decree holder has sustained any loss on account of the non-settlement of the said two classes of waste land owing to the laches of the judgment debtors ; and if so, what amount of loss has been sustained by him ?

J. C.

1900

GIRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY.

4. What may have been the value of the produce of the gardens held in khas by the decree holder during the period of dispossession ?

5. What may be the mesne profits of the lands which were settled with tenants during the period of dispossession ; and whether any land was settled at a low rate by the judgment debtors during the period of dispossession ; and if so, what loss has the decree holder sustained on that account ?

In order to ascertain these facts, it is necessary to make measurement of the lands, and to ascertain the proper rates and rents, and to shew separately and in detail the mesne profits of the different items as ascertained, after receiving oral and documentary evidence and making a khutian of the dakhilas of tenants.

On September 1, 1891, the Civil Court Amin made his report. Objections to this report were filed by the judgment debtor and decree holder on September 19, and on December 5, 1891, the decree holder presented a detailed reply to the objections of the judgment debtor.

On March 31, 1892, the Subordinate Judge of Rajshahye pronounced his order, which substantially affirmed the report of the Amin.

In the course of the proceedings before the Subordinate Judge the appellant objected to the calling of fresh witnesses, and the Subordinate Judge upheld such objection, giving as his grounds that it had not been stated what matters it was sought to prove by the fresh evidence ; that the matter of the assessment of the mesne profits had been referred to the Amin ; that both sides had called witnesses before that Amin ; and that it had not been objected that the Amin either did not give the respondent an opportunity to adduce evidence, or declined to receive any evidence he had tendered.

Under these circumstances the Subordinate Judge was of opinion that there was no reason why the respondent should be allowed before him an opportunity to adduce evidence which he might and ought to have adduced before the Amin, but which he of his own accord had withheld.

The High Court reversed the decree of the Subordinate

Judge. The material passages in their judgment were as follows :—

"We do not agree with the Subordinate Judge in the view he has taken of the right of the parties to adduce evidence in Court"; and they referred in support of this opinion to a decision in 17 W. R. 270.

Again, the Amin and the Subordinate Judge allowed to the appellant interest on mesne profits in pursuance of s. 211 of the Code. The High Court disallowed interest, because the Court which passed the decree under which the mesne profits were being ascertained had "abstained from giving interest on mesne profits," and consequently the appellant was not entitled thereto.

The High Court then dealt with the principle on which the Amin and the Subordinate Judge had assessed the damages, and were of opinion that the Subordinate Judge was clearly wrong in awarding damages "on the basis of wilful default," and added : "what the Subordinate Judge ought to have done was to ascertain the actual assets of the estate the mesne profits of which were claimed, and to award this sum to the plaintiff, and that he has not done."

Two other items on which the High Court overruled the Subordinate Judge were as to perpetual leasehold land in Harifala, and as to period for which mesne profits should be allowed in respect of Nyadiar.

As to Harifala, the Amin had assessed the mesne profits by measuring the extent of the land according to the boundaries given in the decree in the case, and ascertaining the rate at which such land could be let, and this method the Subordinate Judge approved of.

The High Court set this aside, being of opinion that the appellant could recover from the respondent only mesne profits on the basis of actual assets, and referred the matter back to the Subordinate Judge to allow both parties to give evidence as to the actual assets of this property.

As to the village Nyadiar, in respect of which the appellant claimed and had been allowed by the Subordinate Judge mesne profits down to 1892-3, the High Court held that there was

J. C.

1900

GIRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY.

nothing to shew that he could not have obtained possession of this land along with the other lands in 1885 and 1886, and that it had not been shewn that the respondent was active in keeping him out of possession for the years from 1884-5 to 1892-3, and that therefore the appellant was not entitled to mesne profits for those years.

Branson, for the appellant, contended that the principle of assessing the mesne profits laid down by the High Court was wrong in law and inconsistent with the Civil Procedure Code. The Subordinate Judge in his directions to the Amin laid down the right principles of assessment, and both the Amin in taking the account, and the Subordinate Judge in disposing of objections thereto, rightly applied those principles. Sect. 211 of the Procedure Code says that mesne profits of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received therefrom, together with interest on such profits. It was in plain disregard of that definition that the High Court held that the respondent was answerable only for what he had actually received, and was not responsible for what he might with ordinary diligence have received. See *Hurro Doorga Chowdhrani* v. *Maharani Surut Soondari Debi*. (1) It was also in disregard of that section that the High Court refused interest. The decree under execution did not specify interest, but a decree for mesne profits must be construed by reference to s. 211, and it is unnecessary that interest should be specified. The High Court refused it on the ground that the decree "abstained from giving interest on mesne profits," and they relied on *Kishna Nand* v. *Kunwar Partab Narain Singh* (2), which, it was contended, did not support their view.

Further, the High Court was wrong in remanding the case for the calling of further witnesses by the respondent. The respondent was not entitled after a local investigation and report to call further evidence, and institute in effect a fresh investigation by the Court. In order to do so he must make out a case entitling him thereto. The Subordinate Judge refused to allow it because no such case was made, and the

(1) (1881) L. R. 9 Ind. Ap. 1. (2) (1814) L. R. 11 Ind. Ap. 88.

High Court was wrong in allowing it. Reference was made to Civil Procedure Code, ss. 392, 393; *Azim Sarung* v. *Alimooddeen* (1); *Mahabir Pershad* v. *Radha Pershad Singh*. (2) On the evidence the High Court was not justified in setting aside any of the findings of the Amin and the Subordinate Judge.

Mayne, for the respondent, contended that the High Court was right. The Amin was wrong in the principle on which he acted. He proceeded to find the quantities of several kinds of land within a mehal, and the rate at which each bigha could be let out. Instead of that, he ought to have called for the dakhilas and pottahs, and ascertained what rents were actually claimable and actually received by the judgment debtor. Some of the defendants were minors, and there was nothing in their conduct which should have thrown on them the onus of establishing what profits they had received. The appellant should have called the tenants and called for the dakhilas. If he could not produce satisfactory evidence, the statements of the defendants, so far as they were borne out by the revenue and other papers of the estate, should be received. The decree was silent as to interest on mesne profits, and there was good reason for the Court abstaining from decreeing it to be found in the appellant's dilatory conduct. As for the power and right of the High Court to remand the case, see s. 566 of the Civil Procedure Code. [SIR R. COUCH. They did not act under that section; they remanded the whole case.] At all events, that is a mere error of procedure which does not prevent the substantial matters in dispute being adjudicated. The High Court was also right in correcting the decree of the lower Court as regards the period for which mesne profits should be allowed. They should not be given up to the date of possession, since by s. 211 the plaintiffs' right is limited to three years from the date of decree.

Branson replied.

The judgment of their Lordships was delivered by

1900
March 24.

LORD HOBHOUSE. The defendants in this case are grandsons of one Bireswar Roy, who died many years ago. The respondent

(1) (1872) 17 Suth. W. R. 270. (2) (1891) Ind. L. R. 18 Calc. 540.

J. C.

1900

GIRISH CHUNDER LAHIRI *v.* SHOSHI SHIKHARESWAR ROY.

is the senior of them, and the only one who had attained majority when this suit was instituted. It is he who has conducted the defence throughout. The plaintiff, now appellant, is also a grandson of Bireswar in this sense, that Baroda, Bireswar's daughter, adopted him. Bireswar made several grants of property to Baroda, which the plaintiff claimed after her death either as heir or as devisee. Possession of them was taken by or on behalf of the defendants, and in the year 1882 the plaintiff sued to recover them. The question to be decided in this appeal arose in the execution of the decree then obtained by the plaintiff.

The decree is dated December 22, 1883. It declares the plaintiff's right to the villages or estates of which he has been dispossessed, and it proceeds thus: "and that he do get from the defendants khas possession of the same and mesne profits for the period of dispossession, and the Rs. 2,400 claimed for maintenance allowance; that the mesne profits be ascertained on inquiry at the time of the execution of decree; and that the plaintiff do get from the defendants a total of Rs. 1,255 7 annas 9 pies on account of the costs in this suit, with interest from this day till the day of realization at the rate of Rs. 6 per cent. per annum."

In the year 1885 the plaintiff obtained possession of all the estates except one called Nyadiar, of which he did not obtain possession till May, 1891. The present proceedings for account and recovery of mesne profits were commenced by petition filed in January, 1890. The plaintiff asked for mesne profits for three years prior to the institution of the suit up to the date of recovery of possession.

On February 14, 1890, the Subordinate Judge appointed an Amin to conduct the inquiry, and gave him written instructions how to proceed. Another Amin was afterwards substituted for the first, but he proceeded on the same instructions.

On September 1, 1891, the second Amin made his report, which finds a sum of Rs. 14,774 due for mesne profits. The respondent filed a petition of objection on September 19, 1891, afterwards summarised and slightly varied on November 28, 1891. The case was heard by the Subordinate Judge on

March 31, 1892. He passed a judgment which in most respects maintains the Amin's report. The respondent appealed to the High Court, who, differing from the Subordinate Judge on several points both of principle and detail, set aside his order and remanded the case for the purpose of ascertaining the mesne profits which the plaintiff is entitled to in accordance with their foregoing observations. That is the order from which the plaintiff now appeals. The case runs very much into detail, but there are some matters of principle to which their Lordships will first address themselves.

As regards the form of the order, which in effect throws the whole account open again, Mr. Mayne was asked whether, under the provisions of the Code which relate to remands, it was not necessary to state more specifically the issues which the Subordinate Judge is required to decide on remand; and he did not dispute that the remand made was incorrect. That miscarriage in procedure however, though important, does not affect the legal merits of the questions in dispute between the parties. If on those questions their Lordships agreed in substance with the High Court, the decree could be brought into conformity with the directions of ss. 562-566 of the Procedure Code. But with few and unimportant exceptions their Lordships after hearing full argument have to express agreement with the views of the Subordinate Judge.

The most important point on which the High Court hold the Subordinate Judge to be in error is the mode in which the amount of mesne profits is ascertained. The Subordinate Judge directed the Amin to ascertain as to certain nij lands, the value of the crop which could have been grown upon them; as to some waste lands, their rates of rent; as to some gardens held khas, the value of their produce; as to land settled with tenants their mesne profits, and whether any land was settled at a low rate by the judgment debtors during the period of dispossession.

He continues:—

"In order to ascertain these facts, it is necessary to make measurement of the lands, and to ascertain the proper rates and rents, and to shew separately and in detail the mesne profits

J. C.

1900

GIRISH CHUNDER LAHIRI v. SHOSHI SHIKHARES-WAR ROY.

of the different items as ascertained, after receiving oral and documentary evidence and making a khutian of the dakhilas of tenants."

From an interim report made by the first Amin to the Subordinate Judge on September 20, 1890, it appears that the plaintiff was making slow progress. He said there were four or five hundred tenants on the land; that they would not appear voluntarily, being under the influence of the debtors; that there was difficulty in finding them, and in serving summonses during the rainy season. The Amin adds that he is instructed to inspect the dakhilas of tenants, which will take a long time because of their number, and by the time that is done the land will be dry enough for measurement. In the meantime he is putting pressure on the plaintiff, who, as he intimates, has not shewn sufficient activity. Upon this report being made, the plaintiff presented a petition alleging that the delay was due to the Amin, who would not or could not come to the place before the rains. Shortly afterwards the change of Amin took place.

The report of the second Amin, who did all the work that was done, again shews the difficulties that beset the plaintiff in the inquiry :—

"It was difficult for the decree holder to adduce more evidence than that found on the spot, because the judgment debtors are powerful zemindars of the place, and all the tenants are under their control and obedient to them. The decree holder is a man in ordinary circumstances. He was not a man of influence or power in the mofussil, so that he could duly muster the tenants and prove his cause or make them file their dakhilas, and satisfactorily establish his case. . . . . Notwithstanding that the judgment debtor No. 1 (the present respondent) was repeatedly called upon to produce the collection papers, the papers shewing the lands and their jummas, no papers were produced on his behalf; and the evidence that was taken of the few witnesses on his behalf was not sufficient. A sheet of paper containing the rates of rent of Sabrul village, which was produced on his behalf, was an incomplete copy, and it can hardly be relied on."

Under these circumstances the Amin had recourse to other evidence. As regards Harifala, one of the largest properties, he made a map according to the boundaries given in the decree. These boundaries were verified by witnesses on both sides. Then he found the quantity by actual measurement, and ascertained by the collection papers and such other evidence as he could get the rates at which the land could be let. Apparently he pursued the same course as regards Binodhpore, the only other large property.

The defendant's objection is that the Amin did not proceed on the basis of the tenants' dakhilas or receipts for rent. The Subordinate Judge holds that the Amin did rightly. The High Court think otherwise. They say that the Subordinate Judge has charged the defendant on the basis of wilful default, and that there is no case for such a charge. What he ought to have done was to ascertain the actual assests of the estate. They comment on the absence of rent receipts, and consider that in their absence the evidence is insufficient to shew the value of the lands.

There are then two questions raised on this part of the case: first, whether the Subordinate Judge was bound to ascertain the actual assets—by which, as their Lordships understand, the learned judges mean the actual amount of money or value which reached the hands of the defendants; and, secondly, whatever was to be ascertained, whether it was essential to resort to the evidence of rent receipts.

It seems to their Lordships that the first question is settled by the Code of Civil Procedure. The original Code of 1859 did not contain any definition of mesne profits. The Code of 1877, s. 211, added an explanation: "Mesne profits of property mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom." In the existing Code of 1882 that explanation is repeated with an addition which gives rise to another dispute in this case, namely, "together with interest on such profits." The Amin as directed by the Subordinate Judge has tried to ascertain the very thing which the Code directs. He called for evidence of actual receipts.

J. C.

1900

GIRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY.

Whether if that had been produced it would have satisfied the inquiry cannot be known. It might still have been necessary to inquire into the possibility of larger receipts by ordinary diligence. But the plaintiff could not, and the defendant who was the actual recipient would not, produce the evidence. So the Amin turned to the other alternative, namely, to ascertain what might have been received with ordinary diligence. The Subordinate Judge's order does not charge the defendants with wilful default. Indeed, if it did it would adopt a principle more favourable to the defendants than that of the Code; for there may be values recoverable by ordinary diligence which yet it would not be wilful default not to recover. Wilful default is charged against persons in rightful possession though accountable for their dealings with the property. These defendants were wrongfully in possession. And prima facie it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land, and that the true owner wrongfully dispossessed has been a loser by that amount.

This view is quite consistent with holding that the proper evidence was not procured. The High Court attach great importance to the dakhilas, and quite rightly. They are not, indeed, so important as they would be if the inquiry was confined to the actual receipts, because from various motives lands may be let at rates lower than the ordinary ones. Still, in deciding a dispute on the question what is the ordinary rate, actual payments made by tenants must always be of value. But it is clear from the reports of both Amins that the plaintiff had great difficulty in procuring this evidence. The Subordinate Judge says, speaking of Harifala :—

"As regards this item, the judgment debtor contends that the Amin is wrong in not ascertaining the amount of wasilat by referring to the dakhilas of the tenants, but by finding the quantities of the several kinds of lands contained within the mehal and the rate at which each bigha of lands could be let out. I cannot say that the Amin is wrong therein. All the tenants and all the dakhilas of each tenant could not be found. They are mostly ryots of the defendant, judgment debtor. The

defendant should have produced all of them and made them produce all their dakhilas; and when he did not produce them and make them produce all their dakhilas, I cannot say that the Amin was wrong in not ascertaining the amount by reference to the dakhilas. Again, the principle of ascertaining the amount by reference to the dakhilas is wrong. It may be, as urged by the decree holder, that the judgment debtor let out the lands at a rate lower than the ordinary one in order to make the tenants come over to his side. I am therefore of opinion that the Amin was right in ascertaining the amount by finding out the quantities of the lands contained within the mehal and the rate at which each of them could be let out."

Moreover, the defendant was the beneficial owner of the rents for which these dakhilas were given, and though he may have been a minor for part of the time, the evidences of receipt by his guardians must be in his power. It has been shewn above what the second Amin says of his silence. It is clear that he could if he pleased have put in evidence which would shew whether the inferences of value drawn by the Amin would or would not stand the test of actual transactions between lessor and lessee; but he did not call the tenants with their receipts or produce his own accounts. Their Lordships asked Mr. Mayne whether the defendant had given any counter-evidence at all to rebut the plaintiff's case, and he answered that none could be found, the plaintiff's case being left precisely as he put it before the Amin and the Subordinate Judge.

On this part of the case it appears to their Lordships, first, that the Subordinate Judge rightly apprehended what is the proper object of an inquiry into mesne profits; and, secondly, admitting the tenants' receipts to be evidence of value and possibly of great value, they were not necessary evidence; their importance has been over-rated owing to a misapprehension of the object of the inquiry; and the defendant's failure to put them in has been visited by the Court on the head of the plaintiff.

Another question important in principle, though it cannot be

J. C.

1900

GIRISH CHUNDER LAHIRI *v.* SHOSHI SHIKHARESWAR ROY.

ascertained of what practical importance it was to the result of the case, is whether the Subordinate Judge ought to have received further evidence after the Amin's report. It seems that after lodging objections the defendant summoned witnesses, and on their non-appearance applied for warrants of arrest. The following is the Subordinate Judge's note of what passed in Court :—

"An objection has been preferred on the part of the decree holder that the judgment debtor has no right to put in new evidence. It does not appear what matters the judgment debtor seeks to prove by producing witnesses. An Amin is appointed to ascertain the wasilat after taking evidence from the parties, and this was the case in this instance. It appears that both parties have adduced evidence before the Amin. The evidence which each party needed to adduce ought to have been produced before the Amin. It has not been objected that the Amin did not give the judgment debtor an opportunity to adduce evidence, or that he declined to receive any evidence which had been already presented. No reason appears why the judgment debtor should now be allowed to adduce evidence, which he might have and ought to have produced before the Amin, but which he of his own accord withheld. If such a thing is allowed, then the main purpose connected with ascertainment of wasilat by the Amin, and of the laws and circulars relating thereto, will stand defeated. Consequently, additional evidence in this matter cannot now be taken."

The High Court think this decision was wrong, and they found their opinion on a judgment delivered by Sir Richard Couch. (1) That report is one of the large number contained in the *Weekly Reporter* which are useless or misleading because the facts of the case are not stated. The only point of law or of practice laid down in the judgment is that the Court will treat the Amin's report as part of the evidence in the suit and will take other evidence if necessary. If that judgment is taken as laying down that it is necessary to take further evidence whenever one of the parties chooses, it has been misconstrued. The High Court in that case considered the further evidence

(1) 17 W. R. 270.

necessary and the reason given for rejecting it insufficient. Why we do not know, because no facts are stated except the tender of the evidence and its rejection.

The sections of the Code (392, 393) which relate to local investigations do not contemplate the tender of further evidence after an Amin's report except the examination of the Amin himself, but they do not forbid it. They are consistent with either course, and the point must be decided on general principles according to the facts of each case.

In every trial there must come a time when it is proper that the evidence should be closed. After that time new evidence should not be given as a matter of course or without the assent of the Court. As regards local inquiries, it may in many cases be clearly proper and convenient to take evidence in court after taking it in the locality. In others it may be equally clear that the locality is the proper place and the time of inquiry the proper time for bringing the proposed evidence. In this case the most obvious time for closing evidence on the inquiry was the presentation of the Amin's report, which is itself made evidence by s. 393. What reason did the defendant give for adducing further evidence? None whatever, either in his written objections to the report or in his grounds of appeal from the Subordinate Judge. He did not even state what was the nature of the evidence he desired to submit, nor does the High Court state it, nor can the counsel at the bar now state it. It may for all that appears be purely frivolous. The learned judges below do not in terms affirm the absolute right of every party to a local investigation to adduce evidence before the Court after a Commissioner's report. But their decision cannot be supported unless that right exists; however much the party may have neglected to produce his evidence at the proper time and in the proper place; even though, as in this case, he has disregarded repeated demands of the Amin for his evidence; and even though, as in this case, he either cannot or will not state what is the nature of his fresh evidence, nor why he brings it so late, which may be because a discussion in the locality does not suit him so well as a discussion at a distance. Their Lordships agree with the Subordinate Judge that such a

J. C.

1900

GIRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY.

practice would, at least to a great extent, defeat the very object of local investigation. The whole case might be tried over again, not in the locality, but at the distant seat of the Civil Court. It seems to them that the Subordinate Judge has applied sound principles of adjudication to the facts of the case.

Another point on which the High Court reverse the decision of the Subordinate Judge is the allowance of interest on the profits as ascertained year by year. Mr. Branson has shewn that there is error in supposing that the interest has been calculated with quarterly rests, but that is not the ground of the judgment. The learned judges below think that the decree did not award any interest at all. That depends on the construction of s. 211 of the Code, which imports into the expression "mesne profits" the addition of "interest on those profits."

The learned judges say that the Court has still jurisdiction to give or refuse interest as it chooses. Their Lordships agree, because mesne profits are in the nature of damages which the Court may mould according to the justice of the case. But the question is, what is the effect of a decree which grants mesne profits and says nothing about interest, which, as their Lordships think, is the proper construction of the decree in this suit? The learned judges treat that silence as equivalent to a decision that there shall be no interest. But then it is difficult to see what effect is given to the alteration made in s. 211 in the year 1882. Its obvious effect is to provide that a simple decree for mesne profits shall carry interest on them. No reason has been assigned for holding the true effect to be other than the obvious one. If the Court does not intend to give interest it should say so. The learned judges give reasons for thinking that interest ought not to be given in this case. But in execution proceedings we are only construing the decree and not considering its merits. The case *Kishna Nand* v. *Kunwar Partab Narain Singh* (1) has no bearing on the present one. The defendant there was the manager of an incumbered estate under a special statute, and

(1) L. R. 11 Ind. Ap. 88.

not in wrongful possession at all. The decree for account expressly disallowed interest. On appeal this Board refused to interfere with the discretion of the Courts below. Speaking in 1884, their Lordships declined to say "whether in the present state of the law, having regard to the provision in the Procedure Act in which there is an explanation of mesne profits, interest was allowable."

Another question arises out of a tunkha or annuity of Rs. 400 per annum granted in perpetuity by Bireswar to Baroda. It was specially secured to her by providing that she might deduct the amount out of the rent reserved and payable by her upon grants made to her of the Binodhpore and Harifala estates by Bireswar. Of these properties the plaintiff was dispossessed. The amount of tunkha up to date was recovered by decree. In estimating mesne profits after decree the defendant claimed to be allowed the reserved rent, which was not disputed. But then the plaintiff claimed to set off the tunkha against it, and the Subordinate Judge allowed it. The High Court have disallowed it. Their Lordships confess themselves unable to understand the reasons of this disallowance as printed in the report ; nor could Mr. Mayne explain them. It is not alleged that in any way the plaintiff has got the benefit of the tunkha twice over. He is certainly entitled to it once. It must be held that the Subordinate Judge was right.

On two small items 3 and 4 in the Amin's index, relating to a property called Sabrul, an unusual kind of controversy has arisen. The Subordinate Judge states that no party raised any objection to these items. At the hearing of the appeal before the High Court the defendant's counsel denied this statement, and produced an affidavit from one of the defendant's Amla to the effect that objection was taken. The learned judges, observing that no contrary affidavit had been produced, thought that the two items should be the subject of adjudication. In point of fact there was a contrary affidavit by the plaintiff himself, who was in court during the whole hearing before the Subordinate Judge instructing his pleaders ; but this must somehow have been overlooked. It has been

J. C.

1900

GIRISH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY.

shewn by the Amin's report that the defendant produced to him a paper relating to the rates of rent in Sabrul, but in such an imperfect state as to be useless. In the defendant's detailed objections to the Amin's report Sabrul is not mentioned. In the summary Sabrul is placed among a list of five properties of which it is alleged in general terms that the rates of rent and the classification of lands are wrong. It strikes their Lordships as highly inexpedient that such a controversy should be raised by affidavit before the High Court without any application to the Subordinate Judge himself. If these items stood alone they would not, on the materials before them, feel justified in sending the case back to the Subordinate Judge; but as this must be done on other points, it may be more satisfactory to have this dispute cleared up.

Other items which constitute points of difference, all comparatively small, may be briefly disposed of. On the question of collection charges, whether they should be 5 or 10 per cent., which is not made the subject of evidence, their Lordships think it right to follow the High Court. As to the village of Nyadiar, their Lordships agree with the High Court. The Subordinate Judge gives the plaintiff mesne profits up to the date of possession. But that is more than three years from the date of the decree, and to the extent of the excess is unauthorized by s. 211 of the Code. As regards Chakran Pakuria and Ghosepara, in which cases the learned judges think that the Subordinate Judge has made mistakes of a clerical kind, the mistakes have not been shewn to their Lordships, and the amounts must be very small, such as of themselves would hardly justify further inquiry. But as the account has to be rectified in some particulars it may be reviewed on these points also.

There are several subjects on which the High Court state that the evidence is unsatisfactory to them, such as charges for fruit-trees, for fruit-bearing land, and for cesses, and the existence and extent of Khamar land in Binodhpore. Their Lordships make the general observation that the appreciation of evidence by the High Court is and necessarily must be subordinated to their view of the proper issue to be tried, as to

which their Lordships have expressed agreement with the Subordinate Judge. None of these subjects have been laid before their Lordships in any detail, and they see no reason why the conclusions arrived at, first by the Amin and afterwards by the Subordinate Judge, should be disturbed under a general reopening of the whole account.

Their Lordships will state the heads of the decree which they think the High Court should have made on the appeal to them. Declare that the collection charges should be at the rate of 10 instead of 5 per cent., and refer it to the Subordinate Judge to remodel the account accordingly. Declare that mesne profits for Nyadiar should not be allowed for any later time than three years from the date of the decree, and refer it to the Subordinate Judge to remodel the account accordingly. Refer it to the Subordinate Judge to ascertain whether he has erroneously allowed mesne profits for Ghosepara twice over, and whether he has in his final estimate allowed mesne profits for Chakran Pakuria which in his detailed judgment he disallowed. Refer it to the Subordinate Judge to make a formal adjudication on items 3 and 4 in the Amin's index. Let the Subordinate Judge finally readjust the amount recoverable by the plaintiff in accordance with his findings on the foregoing references. Quoad ultra dismiss the appeal with costs in proportion to the amounts in respect of which the parties may, after the inquiry has been completed, be found to have succeeded and failed respectively. That is the decree which their Lordships will humbly advise Her Majesty to make in lieu of the decree now appealed from, which will be discharged.

As regards the costs of this appeal, in which the rule of proportion observed in India does not prevail, their Lordships consider the success of the defendant to be so minute in proportion to the whole controversy that it ought not to weigh on the question of costs. The mesne profits of Nyadiar constitute the only point of principle on which the respondent has succeeded. Nyadiar is valued at Rs. 68 and a fraction, and the time of excessive mesne profits is less than four and a half years; so there is little over Rs. 300 in question. On all the

J. C. important points the respondent is held to be wrong. He must pay the costs.

1900

GIRISH CHUNDER LAHIRI *v.* SHOSHI SHIKHARESWAR ROY.

Solicitors for appellant : *Withers, Pollock & Crow.*
Solicitors for respondent : *T. L. Wilson & Co.*

J. C.* AMRITO LAL DUTT . . . . . PLAINTIFF ;

1899

AND

Nov. 8, 9. SURNOMOYE DASI AND OTHERS . . . . DEFENDANTS.

1900

ON APPEAL FROM THE HIGH COURT IN BENGAL.

May 2.

Hindu Adoption—Authority to adopt — Executors cannot be authorized to Adopt.

Where a Hindu by his will authorized an adoption by his widow and his executors jointly, and by his executors after her death :—

Held, that the authority was invalid. The will was incapable of the construction that authority was in reality given to the widow restricted by the consent of the executors.

APPEAL from a decree of the High Court (April 5, 1898) reversing a decree of Jenkins J. (March 9, 1897).

The question decided herein was whether an adoption of the appellant, which was admittedly carried out in fact, constituted him in law the adopted son of Hurridas Dutt, the husband of the respondent Srimutty Surnomoye Dasi, who purported to adopt him as a son to her late husband.

Hurridas Dutt was a Hindu inhabitant of Calcutta, a Sudra, and subject to the Dayabhaga School of Law. He died on October 30, 1875, leaving his sole widow the respondent, Srimutty Surnomoye Dasi, and two daughters, from whom are descended the other respondents.

On the day of his death he executed his will, the material passages of which are set out in their Lordships' judgment. He appointed his wife, his father Modhu Sudan Dutt, and his

**Present*: LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

uncle Dwarka Nath Dutt, his executrix and executors. The will was proved by the widow and uncle. The adoption of the appellant was made in 1881 by the widow with the consent of the uncle, who was then the surviving executor.

The suit was brought on August 1, 1894, by the appellant, claiming that the estate of the testator had vested in him, and that he was entitled to possession. The respondents contended that there had been no valid adoption of the appellant as son to the testator, inasmuch as the power to adopt given by the testator was invalid in law.

Jenkins J. held that the testator, desiring the adoption of a son to himself, in accordance with the provisions of the Hindu law, gave his wife the power to adopt a son, and only associated the other executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption, and not with any intention of making it an essential condition of the adoption that they should take a part in the ceremony at such adoption, from which they were by law excluded. He accordingly decided that the power to adopt was a good one and well given; also, that it had survived to those by whom it was exercised, and was validly exercised by the widow when she adopted the appellant with the approval of the surviving executor.

The material passage of his judgment is :—

"The argument urged against the validity of the power is shortly this. It is said that though a husband can delegate to his widow a power to adopt, still he can delegate it to no one else; consequently, it is argued, the present power to adopt is bad, because though it is delegated to the widow, still it is not to her alone, but to her in association with others. Now, it is admitted on the part of the defendants—indeed, it is a part of their argument—that though the widow's discretion under a delegated power is absolute in the sense that she cannot be compelled to act upon it unless or until she so chooses, still any condition or clog can be imposed upon the exercise by her of this delegated power; and it therefore appears to me that, so far as the association of the two executors was a fetter on the absolute discretion and choice which might otherwise have

J. C.

1900

AMRITO LAL DUTT v. SURNOMOYE DASI.

existed, it cannot have vitiated the power. It may be that the widow alone is capable of performing the actual ceremony of adoption—that her hand alone can receive the child; but I do not find in the phraseology used by the testator any direction requiring or even justifying the inference that he desired or intended that the executors should take a part in the ceremony from which they are incapacitated by the rules of Hindu law.

"It is clear from the prefatory recital with which the 8th clause of the will commences, that the testator did desire the adoption of a son in accordance with the provisions of the Hindu law, and, though it may be unprofitable to speculate as to his motive, I think that he had a purpose beyond the mere designation of a beneficiary to take under his will; and I must decline to put on the language of the will a construction that would render its provisions useless. In my opinion, the testator associated the other executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption, and not with the intention of making it an essential condition of the adoption that they should take a part in the ceremony from which they were precluded; and I therefore hold that the power of adoption is valid."

In appeal (Maclean C.J., Macpherson and Trevelyan, JJ.) held that, according to the true construction of the will, the power to adopt was a joint power given to three persons named, the widow and the two executors, and that such power was according to Hindu law a bad and invalid power. Trevelyan J. added that, even if the joint power were a good one, it ceased to have any effect or validity upon the death of the testator's father, one of the joint donees thereof.

Asquith, Q.C., *Mayne*, *Branson*, and *W. C. Bonnerjee*, for the appellant, contended that on the true construction of the will (clause 8) there was a power to adopt validly given to the widow. It was clear that the governing intention of the testator was that there should be an adoption, and the will should be so construed as to give effect to that intention. In terms it was given jointly to three persons, only one of whom could

legally acquire it and act upon it. It should be construed as a conditional power given to the widow, exercisable only on her fulfilling the condition, which was to obtain the assent of her co-executors to her choice of a boy to be adopted. It is matter of common knowledge that only the widow can be the donee of a power to adopt to her husband after his death, and it ought not to be attributed to a testator that he intended to vest such a power in his executors unless no other construction of his words was possible. The widow acted on a legal authority given to her with the concurrence of an executor who was not authorized to adopt. Each of the three parties was authorized to play his part, but only the act of one of them operated to effect a valid adoption, and its validity was not destroyed by the fact that the co-operation of the others was ineffectual, except as fulfilling the condition on which alone the widow's authority vested in her. The power on its true construction is a several power. The grant to the three meant that it was granted to them so far as they were legally capable of holding and exercising it—that is, one was to adopt with the consent of the other two. Reference was made as to the construction of powers to *Bai Motivahoo* v. *Bai Mamoobai*. (1) A fair view of the testator's will is that he did not intend the three persons to act in the adoption, but merely that they should concur in the choice; he could only have meant that that one should act who alone was capable of acting with any effective result.

Cohen, *Q.C.*, *Crackanthorpe*, *Q.C.*, and *Phillips*, for the respondents, contended that, according to the true construction of the will, the testator gave the power to adopt to three persons jointly—his widow, his father, and his uncle. He did not intend to give his widow sole power to adopt either with or without the concurrence of the co-executors. There was no distinction expressed as to which of them should act, and which of them should concur. All must act or none, for the power was a joint one; the widow had no power singly and separately to receive a child in adoption. If the latter was his

(1) (1897) L. R. 24 Ind. Ap. 93, 105.

J. C.

1900

AMRITO LAL DUTT *v.* SURNOMOYE DASI.

intention, it was not carried out by appropriate words; and such words cannot be supplied by conjecture: see *Hunter* v. *Attorney-General* (1); *Abbott* v. *Middleton.* (2)

Asquith, *Q.C.*, replied.

May 2. The judgment of their Lordships was delivered by

LORD HOBHOUSE. This is a suit instituted before the High Court of Judicature in Calcutta in its original jurisdiction for administration of the estate of Hurridas Dutt, who died on October 30, 1875, having executed a will on the same day. He had no son, but left a widow Surnomoye Dasi and two daughters, who were all defendants below and now are respondents. The plaintiff in the suit, now appellant, claims to be the son of the testator adopted by virtue of a power contained in his will; and the cardinal question in the suit is whether or no he bears that character.

The material passages in the will, which was written in English, are as follows :—

"I appoint my wife Srimutty Surnomoye Dasi the executrix, and my father Babu Modhu Sudan Dutt of Mullick's Street aforesaid, and my uncle Babu Dwarka Nath Dutt of Thuntoneah in Calcutta aforesaid, the executors and trustees of this my will."

Paragraph 8: "Whereas having no son born to me of my body I am desirous of adopting one in my lifetime, but in case I depart this life before carrying such my desire into effect, I hereby authorize and empower my wife and executrix Srimutty Surnomoye Dasi, and my executors and trustees, to whom I give full permission and liberty, to adopt after my decease a son, and in case of his death during his minority or on attaining his full age and without leaving male issue, to adopt a second son, and in case of his death during minority or on attaining such age and without leaving male issue, to adopt a third son, and no more. In any of the above cases of adoption, should the adopted son die leaving a son or sons, the power of adoption shall cease or remain in abeyance during the life or

(1) [1899] A. C. 309, 317. (2) (1858) 7 H. L. C. 68, 114.

livestime of such son or sons of such adopted son, but shall revive on the death of such son or sons during minority."

Paragraph 13 : "I authorize and empower my said executrix and executors and trustees and the survivor of them and the trustee for the time being of this my will, to appoint any other person or persons to succeed them or him in the execution of the trusts of this my will."

Paragraph 15 : "In case of any accident arising to cause my wife to depart her natural life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue. Dated this 30th October 1875."

By the 9th clause the testator provided an income for his wife and adopted son during the life of his wife, and directed accumulation of the surplus income. The adopted son is to take the property if he survives the widow and attains the age of eighteen, otherwise it is given over to the daughters.

The will was proved by the testator's widow and his uncle Dwarka Nath Dutt. The testator's father, Modhu Sudan Dutt, did not renounce probate, but he never took any part in the administration of the estate.

On August 9, 1876, a deed was executed by which the widow purported, with the consent of Dwarka Nath Dutt as executor, to accept Joti Pershad Mullick, a boy five years old, as the adopted son of the testator. In the year 1877 Modhu Sudan died, and in January, 1881, Joti died, being then ten years old. On February 9, 1881, a deed was executed by which the widow purported, by virtue of the authority given to her by the will, and with the consent of Dwarka Nath Dutt as executor, to accept the plaintiff, then a boy of eight years old, as the adopted son of the testator. After attaining his majority the plaintiff instituted this suit in the year 1894.

The cause was heard in the first instance before Jenkins J., who held that the plaintiff was rightly adopted, and proceeded to determine the other questions arising under the will. He held, first, that the testator had given the power of adoption to his widow, subject only to the assent of the other executors; secondly, that the death of Modhu Sudan did not destory the

J. C.

1900

AMRITO LAL DUTT v. SURNOMOYE DASI.

power; and, thirdly, that the terms of the adoption deed were in sufficient conformity with those of the will. Both parties appealed from his decision.

The Court of Appeal, consisting of Maclean C.J. and Macpherson and Trevelyan JJ., were unanimous in holding that there was no adoption of the plaintiff. Their main ground was that the power of adoption which the testator purported to give was one which the law does not allow. They further intimated an opinion that, even if the power could be held valid by virtue of the construction adopted by Jenkins J., it could not be exercised after the death of Modhu Sudan. They therefore dismissed the suit.

Their Lordships felt no doubt during the argument that the testator could not confer any such power as he desired. That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu law, and one so constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in various ways, and among them by requiring the consent of persons named by the husband, is also familiar law. If it turns out that such consent cannot be procured, she has no authority to adopt, and that is the question which has been raised in this case with reference to the death of Modhu Sudan. But the fundamental objection arises, not on the events that have happened, but on the provisions of the will as it stood at the testator's death. It never gave any authority at all to the widow. In terms, the literal construction of which admits of no doubt, he authorized an appointment, not by his wife, but by her and the two others whom he had appointed executors and trustees. Whether he intended the authority to be attached to the office can make no difference; or if it did make any, it would not be favourable to the plaintiff. It was given, not to a single person, but to several. Not only so, but the testator went on to authorize his surviving executors to adopt a boy after his wife's death; while rather significantly he did not authorize her to adopt after their death; and yet she was more likely to be the survivor than the members of the elder generation.

The suggestion that the testator really meant to give authority to the widow, restricted by the consent of the others, cannot be accepted as a legitimate construction of his will. It is a mere speculation, and we may speculate in other directions. When using the term adoption, the testator may have been thinking merely of the choice of a male successor in the property ; seeing that he does not leave the adoption to carry with it the ordinary right of succession, but subjects the inheritance to rather capricious conditions, postponing enjoyment during the widow's life, and making the boy's interest in the corpus contingent on his surviving the wife and attaining eighteen. Such speculations however are, in a case in which the language conferring the authority is clear, and there is nothing in other parts of the will inconsistent with it, quite beyond the legitimate range of judicial interpretation.

The joint power conferred on the three executors being invalid, the plaintiff has no status in the family, and his suit was rightly dismissed. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellant must pay the costs.

Solicitors for appellant : *Watkins & Lempriere.*

Solicitors for respondents : *Gush, Phillips, Walters & Williams.*

J. C.* RADHAMONI DEBI . . . . . PLAINTIFF;

1900

AND

Feb. 23, 24; *March* 24. THE COLLECTOR OF KHULNA AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Ejectment—Title by Adverse Possession.

To constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity, and in extent, and is displaced by evidence of partial possession by the defendant.

APPEAL from a decree of the High Court (June 22, 1894) reversing a decree of the Subordinate Judge of Khulna (May 17, 1892) and dismissing the appellant's suit.

The suit was brought on May 24, 1887, against the Mitter defendants and related to the possession and ownership of certain chucks or plots of land which the appellant claimed as constituting her mouzah Uttar Kulati (alias Doorgapore), and which were formerly recorded as Estate No. 44 of the rent-roll of the Collector of Jessore, and afterwards placed in the rent-roll of the Collectorate of Khulna as Estate No. 134.

The respondents claimed that the lands formed part and parcel of their village called Bil Pabla.

The appellant relied on a survey map made by Government officials in 1856, according to which the disputed chucks formed a separate mouzah of Uttar Kulati, and alleged an uninterrupted possession thereof by her husband and herself, which she contended constituted an indefeasible title in her by adverse possession. She further alleged that the Mitter defendants unjustly obtained possesssion under a magistrate's order dated August 31, 1885, and she prayed that that order might be set aside and possession of the disputed chucks be given to her.

**Present* :—LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

The Mitter defendants denied the appellant's title, and claimed that the plots did not appertain to the appellant's talook No. 134 or to Kulati, but to Bil Pabla. They pleaded that the suit was defective inasmuch as the Collector, who represented the Wakf estate which owned Bil Pabla, was not a party to it; and eventually he was added as a party. He thereupon pleaded limitation, alleging that the appellant had not been in possession within twelve years of suit, and in other respects adopted the defence of the Mitter defendants.

The Subordinate Judge decreed in favour of the appellant; but in appeal the High Court found that none of the land in suit lay within the boundaries of Kulati, and that the appellant had failed to prove possession of the land for twelve years before the proceeding in 1885, under which she alleged that she had been dispossessed.

C. W. Arathoon, for the appellant, contended that on the evidence the two reports of the Amin in favour of the appellant and the judgment of the Subordinate Judge in accordance with those reports were correct. The appellant had substantially proved her title by adverse possession from 1856 to 1885.

Cohen, Q.C., and *Branson*, for the respondents, contended that the suit was barred by s. 22, together with art. 47 of Act XV. of 1877. The evidence failed to prove a continuous and complete possession of the disputed lands for twelve years before the order of August 31, 1885, in such a way as would confer upon her a title by adverse possession. It was shewn that the defendants at least were in occasional and partial possession.

Arathoon replied.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The respondents are in possession of the land in dispute by virtue of a magistrate's order granted in August, 1885. The onus is therefore on the appellant, who claims the land, to make out that she has the better right.

In considering the question thus raised it is well to have

J. C.

1900

RADHAMONI DEBI v. COLLECTOR OF KHULNA.

in mind the nature of the disputed land. Its area is about 1400 bighas; but it is a significant fact that the most various estimates on this subject have been made during the period in dispute, the reason being that very few people had occasion to be there or were interested in its size. The degree to which this is the case may be gathered from two facts. It is clearly ascertained that in 1865 there were no human beings living on any part of the ground, and only one-twentieth of the whole area was susceptible of cultivation. At the time of this action there was only one small group of dwellings. The ground, generally speaking, is jungle; but there has been in some parts more or less of intermittent cultivation.

The two competitors for this territory are, on the one hand, the Collector of Khulna (who will hereafter be referred to as the respondent), whose lessee is in possession and whose theory is that this is the southern part of his talook of Bil Pabla, and, on the other hand, the appellant, who is the undoubted proprietor of the mouzah of Kulati which lies to the south of the disputed land. An important feature of the case, however, is that the appellant's theory is not that the land forms part of the mouzah Kulati, but that it forms a separate mouzah bearing the name of Uttar Kulati and lying between Kulati and Bil Pabla. Although the vicissitudes of this prolonged dispute might naturally have suggested the simpler view, the appellant has never pretended that the disputed ground is part of the mouzah Kulati, and this is not suggested on record. The sequel will shew that this is not a merely nominal distinction.

With the doubtful exception of a lease of the disputed land, said to have been executed in 1846, the history now to be considered opens in 1856. What then happened was that a survey of the ground was made by the Government Collector, and a thak map was prepared, depicting the ground as forming a separate mouzah of Uttar Kulati. So far as it goes, this directly supports and substantiates the appellant's case. The map, it is true, shews on its face the facts already mentioned as to the entire absence of population and the extremely exiguous amount of cultivable land. Accordingly, it cannot be

treated as a contemporaneous record of possession so much as of publicly asserted claim.

That claim, moreover, was not allowed for long to stand unchallenged. In 1865 a Government survey was made of Bil Pabla, and the map then prepared records on its face that it was made to rectify the thak map, which had included in other mouzahs parts of Bil Pabla. The ground in dispute is depicted on the plan as having been so treated. As compared with the map of 1856 the map of 1865 has this in its favour—that it bears on iis face thai the survey was made in the presence of the officers and tenants of the owners of the adjoining mouzahs, whereas no such circumstance is recorded on the map of 1856. There has been some controversy as to the occasion of this map being made and as to its authorship; but the evidence and ihe conduct of parties make it clear that it is entitled to no less than the degree of authority which attaches to Government surveys generally. If the map of 1856 records the claim of the appellant, so and with equal authority does the map of 1865 record the repudiation of that claim. The one wipes out the other, and leaves the parties to appeal to possession as the ultimate criterion of their rights.

The appellant, however, cannot escape from this branch of the case without it being noted that the theory of her map is the theory of her record, that this ground was not part of her mouzah Kulati but was a mouzah of itself, bounded by Kulati and bearing the separate name of Uttar Kulati.

In considering the question of possession it is necessary to remember its twofold bearing on the dispute. The appellant's claim is rested first on her title to the mouzah of Uttar Kulati, and second on the statutory limitaiion, she having had (so she asserts) twelve years' adverse possession of the land in dispute. Now, what has been to some extent overlooked by the subordinate judge is that the evidence of possession affects both questions, and not merely the second question. In the view taken by their Lordships of the maps of 1856 and 1865, the appellant has no case on title, unless she has adequately supported by possession her claim embodied in and affirmed by the map of 1856.

J. C.

1900

RADHAMONI DEBI v. COLLECTOR OF KHULNA.

When the evidence of possession is examined, it is found to be divisible into two kinds, having very different values. On the one hand there is abundant supply of evidence on paper, leases and documents of various kinds, and on the other hand there is meagre and conflicting evidence of actual physical possession. Neither feature need excite surprise. The ground has in fact been little used, hence little evidence of physical possession; the ground has for fifty years been the subject of claims, hence paper grants to support those claims.

Now, in the inquiry conducted in the Court of the Subordinate Judge the relative values of those two kinds of evidence have scarcely received due appraisement. Even assuming the authenticity of the lease of 1846 (which singularly enough describes the lands as "Uttar Kulati alias Doorgapor"), it is confronted by the appellant's own plan of 1856 which attests, the absence of effective occupation. Similar criticism applies to much of the evidence from pottahs and kabulyats; and, even where some testimony of physical possession emerges from the mass of documentary evidence, it is found to be exiguous in amount, in some instances uncertain in time and place, and in many instances irreconcilable with equally plausible contrary assertions.

Their Lordships find it impossible to hold that from these materials the appellant has made out her claim of title to the land. Her claim under the Statute of Limitations remains to be considered, but this question gives rise to very much the same observations, within a more restricted region of inquiry.

It is necessary to remember that the onus is on the appellant, and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded, and is indeed evidenced by the dispute which ended in the magistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent to shew that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute which has all or any

of these qualities. The best attested cases of possession do not cover the whole period, and apply to small portions of the ground. While exhibiting those positive deficiencies, the appellant's case is moreover confronted by tangible evidence of possession by the respondent which is far superior in quality. The only persons living on the ground hold and have held their dwellings and cultivated the ground round it by rights derived through Jogendra from the respondent. As has been justly observed in the High Court, the true significance of this evidence was missed in the Court of the Subordinate Judge. It is not merely negative of the appellant's case so far as that portion of ground is concerned which has been so possessed by the respondents, but it is directly contradictory of the whole theory of the appellant's case of possession.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitor for respondent : *Solicitor, India Office.*

J. C.* LUCHMI KOER . . . . . PLAINTIFF;

AND

1900

May 10, 11, 15; *June* 19. CHOWDHRY MOHUNT ROGHU NATH DAS . . . . . DEFENDANT.

Evidence of Marriage—Effect of Direct Evidence—Degree of Weight to be attached to Inferences and Probabilities.

Held, on the evidence, reversing the judgment of the High Court, that the marriage of the appellant to a Rajah since deceased was established.

Direct evidence of the fact of marriage, strongly corroborated by circumstances, even though derived from a period after the Rajah's death, can only be rebutted by the most cogent contrary inferences from the circumstances of the parties, and ought not to be disregarded on the ground of mere general improbabilities inherent therein.

APPEAL from a decree of the High Court (Sept. 10, 1895), reversing a decree of the Subordinate Judge of Tirhoot (Sept. 19, 1892).

The sole question decided in this case was one of fact—"whether the appellant was the lawful wife of Rajah Ram Das, deceased."

The Subordinate Judge, relying on "the direct testimony of so many apparently trustworthy witnesses," held the marriage was proved; and decreed maintenance at the rate of Rs. 750 a month.

The High Court, on the other hand, arrived at the conclusion that the conduct of the parties both before and after the marriage was inconsistent with a marriage having taken place, and consequently considered the evidence of the appellant's witnesses by no means satisfactory. They also considered that if a marriage had heen established Rs. 500 a month was a sufficient maintenance.

Prinsep J. summed up his judgment as follows: "I find

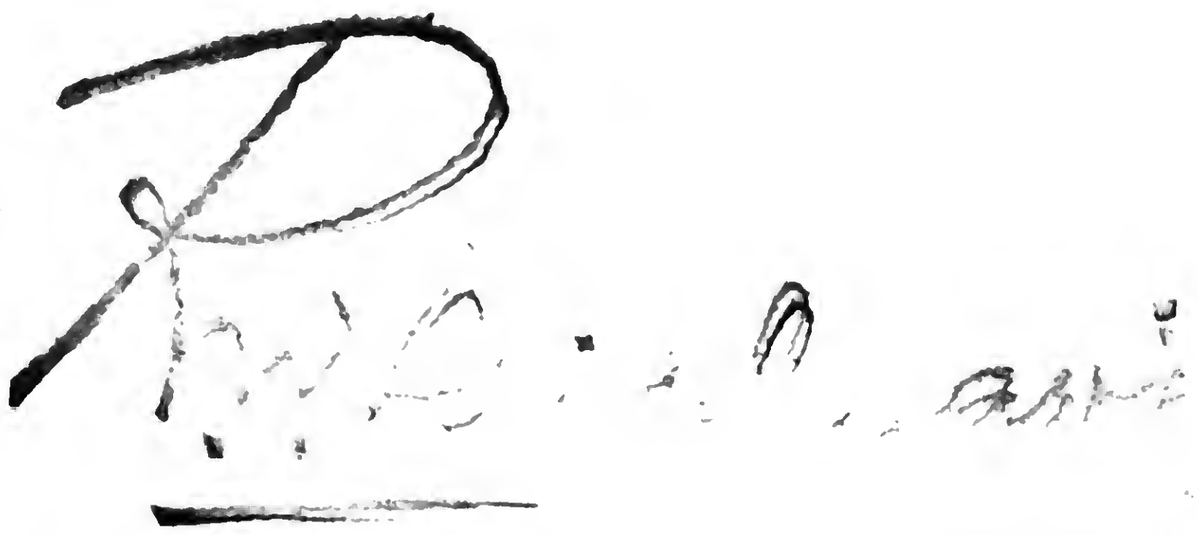
**Present*: LORD DAVEY, LORD ROBERSTON, SIR RICHARD COUCH, SIR HENRY DE VILLIERS, and SIR FORD NORTH.

myself unable to agree with the Subordinate Judge that the plaintiff is the widow of the deceased Rajah Ram Das, and as such entitled to maintenances. The plaintiff's case really depends upon the evidence of the witnesses to the marriage. This evidence is by no means satisfactory for reasons already stated, and it is completely negatived by the conduct of the parties both before and after the alleged marriage. The visit of Gopi Bai at that time seems to have been for medical attendance on the Mohunt, and it would seem that advantage was taken of his dissolute and immoral habits to entangle him into living with the plaintiff. Her age was unmistakably not that stated by her, seven or eight years, and in this respect we agree with the Subordinate Judge; and I here draw attention to the fact that the condition under which the Mohunt is said to have married this girl, namely, that he should acknowledge and appoint her brother as his successor in the mohuntship, which was set up in the proceedings relating to the application for probate, is no part of the evidence in the present case. Moreover, the conduct of the Mohunt himself and the absence of such evidence as might be expected, that the marriage was announced either by him or by persons connected with his estate at Jaintpore when Gopi Bai and her family came to Jaintpore, or indeed was ever openly asserted until the application for probate of the deceased Mohunt made on behalf of defendant, tends to throw discredit on the evidence of the witnesses to the marriage. Lastly, the conduct of the defendant since that time does not prove any admission of the plaintiff's status as widow."

Ghose J., while arriving at the conclusion that the suit should be dismissed, referred to evidence which made for plaintiff's success, and with hesitation decided that the probabilities against the marriage having taken place were such that it would not be safe to hold in the affirmative, and he added that a perusal of the direct testimony did not carry much conviction to his mind.

C. W. Arathoon, for the appellant.

Ross, for the respondent.



J. C.

1900

LUCHMI KOER v. CHOWDHRY MOHUNT ROGHU NATH DAS.

1900, June 19. The judgment of their Lordships was delivered by

LORD ROBERTSON. The question raised by this appeal is whether the appellant was the wife and is now the widow of Rajah Ram Das, who died on November 27, 1878. The suit was initiated by the appellant on November 22, 1890, in the Court of the Subordinate Judge of Tirhoot. The plaint and the written statement of the respondent, who, being heir of the deceased, appeared as defendant, involved other questions on which issue was joined; but these it is now unnecessary to rehearse. Many witnesses were examined and many exhibits were filed. On September 19, 1892, the Subordinate Judge of Tirhoot found that the plaintiff was the lawfully married wife of Rajah Ram Das and is now his widow, and he pronounced decree for maintenance at the rate of Rs. 750 a month. An appeal having been taken to the High Court of Judicature at Fort William in Bengal, that Court on September 10, 1895, set aside the Subordinate Judge's decree and dismissed the suit with costs. The present appeal is brought from that judgment of the High Court.

Rajah Ram Das was zemindar of Jaintpore and a person of considerable wealth and position. He called himself Mohunt, but he was not in fact a Mohunt. Prior to the disputed period he was unmarried, but he was free to marry; he was greatly addicted to women, and he died, under thirty years of age, of diseases induced by his excesses. At the time of the alleged marriage, which was seven months before his death, he was suffering from those ailments.

Of the personal facts relating to the appellant, it is difficult to say anything that is quite certain. She and her mother, for a purpose collateral to the present issue, have thought well to represent her as of the tender age of seven or eight at the time of her marriage, but it may be assumed that she was in fact older and had attained puberty. Her father is a most shadowy figure in the evidence, and his identity is not certainly ascertained. Her mother's part in these proceedings is much more prominent. The respondent suggests that she was an adventuress; and both she and her daughter are, to say the least,

not uniformly truthful even in matters dangerously near the essence of their claim, and they are persons whose own statements must be received with caution and whose case it is necessary to test with vigilance. At the time of the alleged marriage Gopi Bai, the mother, was practising medicine; and, contrary to her own statement, she does not seem to have withheld the benefits of her skill from either sex. She was a Bairagi, as was also the Rajah, and the judge of the High Court, who has formed the most adverse opinion of the appellant's case, considers that Gopi Bai attended the Rajah professionally, and "took advantage of his dissolute and immoral habits to entangle him into living with the plaintiff."

This observation may well introduce what is the central fact in the case—a fact which it is necessary to keep steadily in mind throughout the examination of the evidence, and which narrows the true scope of the controversy. It is common ground between the parties that Rajah Ram Das and the appellant lived together for the last seven months of his life; and the only question is whether this took place on the footing of marriage or of concubinage. Had the fact been otherwise, the inherent improbabilities of the plaintiff's case arising from the alleged age of the bride and the health of the bridegroom would have been extremely difficult to overcome. But, if these two persons, whatever her age and whatever his health, did in fact cohabit during the period in controversy, objections have no relevancy which strike no more at the theory of marriage than at the theory of concubinage, but really at facts common to both. Accordingly, so far as the appellant's age is concerned, the true inference is not that the story of the marriage must be rejected, but only that she was older than she allows, and that the credibility of herself and her witnesses is to that extent affected. Again, the surprise and disgust excited by Gopi Bai having given her daughter to a person in the Rajah's condition of health arise equally on either theory, and have scarcely any influence in the election between the two.

The case of the appellant then, as presented in evidence, is that she was married to the Rajah Ram Das at Benares on a day early in May, 1878. The long interval between the alleged

J. C.

1900

LUCHMI KOER v. CHOWDHRY MOHUNT ROGHU NATH DAS.

marriage and the trial of the issue must be allowed for in considering the evidence of the witnesses examined. It does not, however, give rise to any just suspicion that the appellant's claim is an afterthought; for, immediately after the death of Rajah Ram Das, the appellant judicially asserted herself as his widow, and she received maintenance out of his estate from his death down to the dispute which led to the present litigation. These points will be hereafter more fully examined.

The appellant has submitted to their Lordships' consideration the evidence of eleven witnesses who assert that they were present at the marriage ceremony, and two who assert that they were present at the procession immediately preceding, but not at the ceremony itself. The marriage rites to which the witnesses depose were appropriate to the fact that both parties were Bairagis. The body of evidence thus presented is so substantial that it is difficult to disregard it, unless analysis shews its quality to render it unreliable. The respondent has boldly faced this difficulty, and asked their Lordships to follow the High Court in entirely rejecting it. It is to be observed, however, that neither of the learned judges of the High Court has presented any destructive criticism of that evidence, founded on inherent defects; the conclusion of both is rested on the antecedent improbability of such a marriage, and on the subsequent events of the case. Their Lordships have had the benefit of a close and careful examination of the evidence by the respondent's counsel, and they are unable to find adequate grounds for believing that witnesses who are not only numerous but of various social positions have been suborned, and the respectability of some of them is vouched for by the learned judges in the High Court. But further, all the witnesses were cross-examined, and the cross-examination has in no instance shaken the evidence, while in several cases it has brought out circumstantial and striking additions to its verisimilitude. There is no monotony in the evidence, while at the same time there are no contradictions; each witness speaks from his own point of view, and some saw more and some less.

On one point indeed the respondent has succeeded in raising the suspicion that some of the witnesses have spoken rather on

the suggestion of the appellant's mother than from their own knowledge, and that is the appellant's age. It seems certain that at the time of the marriage the plaintiff was not so young as seven or eight, and many of the witnesses give that as her age. But, even assuming that those witnesses have too facilely accepted the appellant's story as to her age, their Lordships do not regard this as an adequate ground for rejecting the whole of their evidence as tutored. The age of the bride (whose dress precluded any accurate inferences from her face or figure) was not a matter on which they had personal knowledge or could do otherwise than rely on information, whereas the matter which they came to attest was the factum proprium that at Benares on a certain day they saw certain things done.

On the whole, the solid body of direct testimony presented by the appellant as to the fact of marriage can only be rebutted by the most cogent contrary inferences from the circumstances of the parties. Before ascertaining whether such exist it is well to gather together those proved facts which corroborate the affirmative evidence.

Of these, one is supplied by the respondent. In cross-examination the appellant seems to have been challenged by the respondent to say whether any persons were with the Rajah when he was at Benares on the occasion of his marriage, and she named two persons, both of whom were afterwards put into the witness-box by the respondent. Both these men were very likely to have been with the Rajah on the occasion in question, if he himself was there, for they were close attendants and confidants, as their own depositions shew. It was manifestly the duty of the respondent, if the appellant had spoken falsely on this crucial test of her story which he himself had selected, to disprove her statement by these witnesses; yet neither was asked a question on the subject. The appellant may fairly claim, and the Subordinate Judge has held, that her statement that they were present is to be accepted as true.

The next fact in the order of time is one which has substantial importance, and has been treated much too lightly in the High Court. After the death of the Rajah, the executor under his will applied for (and ultimately obtained) probate.

J. C.

1900

LUCHMI KOER v. CHOWDHRY MOHUNT ROGHU NATH DAS.

But on January 18, 1879, within two months of his death, the appellant filed a caveat in the Probate Court designing herself as widow of the Rajah, and she followed this up by a written statement in which her marriage was specifically alleged. It is unnecessary to consider the main contention which she maintained on that occasion, for the judge held that, even assuming everything she said to be true, no valid objection was stated to the prayer of the executor for probate. The point is not merely that the appellant immediately shewed herself in the character of widow, but that she thus came forward, not asserting her marriage (as if assertion were needed), but assuming it, in order to enforce what she alleged to have been a condition of her marriage, namely, that her brother should be adopted as son of the Rajah.

This tone of the appellant's pleading, implying that the marriage itself was undisputed, is in harmony with certain admissions by the respondent, who it is true was only a boy at the time of the Rajah's death, but who says that five or six months before that event (that is to say, just after the alleged marriage) he had heard the appellant and her mother say that the appellant was married to the Rajah. The position taken by the appellant in the probate proceedings throws a strong light also on the subsequent payment to her of maintenance, for there could be no dubiety as to the footing on which she received it. These payments were made regularly until the respondent got into pecuniary embarrassment, and there are extant tankhas in which the allowance is expressly said to be on account of maintenance. The respondent has sought to assimilate these payments to payments to certain prostitutes who had been the mistresses of the Rajah, on the ground that in a statement of liabilities the allowance of the appellant appears in juxtaposition to those doles. But even in this juxtaposition the appellant's name is distinguished by the honourable prefix of Mussummat, while the amount of her allowance is in marked contrast to those of the others. Among the minor corroborations of the appellant's claim she points to the fact that in certain letters to her the respondent addressed her as bhouji (brother's wife), and although the amatory tone

of the letters precludes the reader from taking everything literally, this is to be noted along with the other facts of the appellant's case. The circumstances now noticed, derived from the period after the Rajah's death, furnish strong corroboration of the direct evidence of the fact of marriage. (Their Lordships do not rely on some words uttered by the Rajah himself, for they may possibly have been intended merely as an evasion of an unwelcome inquiry.)

Against this evidence the respondent has mainly relied on the general improbabilities arising from the alleged age of the appellant and the health of the Rajah, on the inferiority of her position, on the absence of religious motive for the marriage, and on a variety of other objections, such as the unlikelihood of a personage like the Rajah going to Benares for his marriage without a retinue. Several of these matters have been already touched on; and there is this further general observation to be made—that the disorders of the Rajah's life make the ordinary criteria of conduct misleading guides to the truth of what he allowed himself to do or was induced to do. It may very well be that Gopi Bai had established an influence over this invalid and voluptuary to which her medical skill contributed, and that the Rajah did not court publicity for a marriage upon which reflection might be made.

The respondent, however, has advanced a few specific facts which, so far as they go, bear directly against the marriage. The Rajah had made his will before the alleged marriage, and in it, of course, there was no provision for the appellant. When he did make provision for her, it was by furnishing the larger part (if not the whole) of the price of a property, which was conveyed by the seller to the appellant. Now, the purchase and the terms of the conveyance were arranged by two persons, of whom one was a servant of the Rajah and the other a servant of Gopi Bai, and the respondent's point is that the appellant is not described as the Rajah's wife, but as if she were unmarried. Prima facie this is an argument against the appellant; but it is not of a very conclusive character, and the respondent did not bring home either to the appellant or Gopi Bai or to the Rajah any knowledge of the terms of the conveyance. As

J. C.

1900

LUCHMI KOER v. CHOWDHRY MOHUNT ROGHU NATH DAS.

regards the testamentary intentions of the Rajah towards the appellant, it may very well have been that he relied, as he justly might, on the provision of the law to secure this lady maintenance over and above the property conveyed by this deed of sale.

On a full consideration of the whole case their Lordships deem the marriage to be established.

On the question of the amount of maintenance, their Lordships agree with the High Court in fixing Rs. 500 a month as the sum which the appellant ought to receive. They will humbly advise Her Majesty that the judgment of the High Court should be reversed, and that of the Subordinate Judge should be restored with this variation, that the amount of maintenance be Rs. 500 a month instead of Rs. 750 a month, and that the respondent pay the costs in the High Court and proportionate costs in the Court of the Subordinate Judge. The respondent will also pay the costs of this appeal.

Solicitors for appellant: *Watkins & Lempriere.*

Solicitors for respondent: *T. L. Wilson & Co.*

RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU . . . . . } DEFENDANT;

AND

RAJA YARLAGADDA DURGA PRASADA NAYUDU . . . . . } PLAINTIFF.

RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU . . . . . } DEFENDANT;

AND

RAJA YARLAGADDA VENKATA RAMA-LINGAMMA . . . . . } PLAINTIFF.

(TWO APPEALS AND TWO CROSS-APPEALS RESPECTIVELY CONSOLIDATED.)

J. C.*

1900

June 27;
July 11.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Effect of Partition on Status of the Family—Rights to Maintenance by Holder of impartible Estate—Arrears of Maintenance.

In a suit for general partition of Hindu family estate the plaintiff succeeded with regard only to a small portion thereof, the bulk being held to be impartible :—

Held, that the Hindu family did not in consequence of these proceedings become a divided one; and that as regards the impartible estate the younger brothers retained their rights of maintenance.

With regard to arrears of maintenance, past non-payment does not necessarily give a right of action: it is a prima facie proof of wrongful withholding. Where the evidence shews that the holder of the estate was unwilling to pay and denied the right, that prima facie proof is not rebutted.

APPEAL and cross-appeal from a decree of the High Court (March 9, 1894) affirming with variations a decree of the District Judge of Kistna (Dec. 4, 1891).

There was a second appeal and cross-appeal from a decree of even date in a suit brought by the younger brother of the plaintiff in the first appeal. All proceedings in the two suits were identical.

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY DE VILLIERS.

J. C.

1900

RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU v. RAJA YARLAGADDA DURGA PRASADA NAYUDU.

The plaintiffs in the two suits were the respondents above, whose names briefly are Durga and Ramalingamma. They sued the appellant, the zemindar of Devarakota. The three parties to the suits are the sons of Ankinidhu, deceased.

The previous litigation between the parties, raising the question whether the zemindary was partible or impartible, is sufficiently set out in their Lordships' judgment.

The plaint claimed—(1.) maintenance at Rs. 2,000 per month; (2.) Rs. 5,31,938.14.5 for arrears of maintenance; (3.) Rs. 12,000 for expenses of marriage of his children; (4.) the provision of suitable houses, lands, utensils, furniture, and other properties.

The defendant in his written statement pleaded that, since the District Court's decree in 1882 deciding that the zemindary was impartible, he and the plaintiff had been divided in estate, and that he was no longer liable to maintain him; that the claim was extravagant, and as regards some of the items inadmissible; that the plaintiff was not entitled to any arrears of maintenance prior to a written demand made in respect thereof on March 30, 1891; that till February, 1879, the plaintiff had been maintained by the defendant, who had been willing to continue to maintain him, but the plaintiff refused to be maintained for the purpose of bringing vexatious suits. He also alleged that the most part of his claim for arrears was barred by limitation.

The District Judge gave one judgment in both cases. He found that the claim for maintenance was not affected by the decree in the partition suit and was not barred by limitation. He considered that Rs. 500 per mensem was a proper sum for maintenance, and he added to this a further sum of Rs. 250 to cover the other claims which he disallowed. He found that nothing had been paid to the plaintiff since the death of Ankinidhu, and he awarded arrears of maintenance for twelve years at Rs. 500 per month, deducting payments made, but refused interest. The whole to be a charge on the entire zemindary. The result in each case was an award for Rs. 56,000, with future maintenance at Rs. 750.

The High Court agreed with the District Judge on all points

except the amount of arrears and the nature of the charge on the zemindary. They said :—

"The District Judge has granted arrears at the rate of Rs. 500 per mensem for twelve years prior to the institution of the suit. In this we think he was wrong. The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable. The circumstance, however, that a person entitled to maintenance has not in fact been maintained by the person chargeable, does not necessarily give him a right of action for arrears. On proof of failure to maintain without more he cannot be said to become a creditor of the person in default. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled. (1) If it were not so, it would mean that the manager of the family could, at the choice of any member preferring to reserve his claim for maintenance out of current income, be compelled to pay him from time to time sums of accumulated arrears which could only be paid out of capital. In this case it is admitted that the plaintiff has since May 1, 1875, been living apart from the defendant, and has neither asked for nor received maintenance except what he received under the order of the High Court pending the appeal to the Privy Council—that is, between December, 1887, and July, 1890.

In our opinion it is clearly the plaintiff's own fault that he has not received maintenance for the whole period of twelve years for which he claims it. In his suit brought in 1880 he made another and inconsistent claim, and therefore he has no right, now that he has failed in that litigation, to complain that a claim not made by him though conceded by the defendant was not satisfied. There has been no wrongful withholding on the part of the defendant. We must, therefore, reverse the decision of the District Judge with regard to the arrears except as regards the period above mentioned, during which payment was actually made. The allowance for that period was demanded and given on the footing of maintenance, and as the sum will have to be refunded by the plaintiff in execution of the

(1) *Jivi* v. *Ramji*, (1879) Ind. L. R. 3 Bomb. 207 ; 6 Mad. 83.

J. C. 1900

RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU v. RAJA YARLAGADDA DURGA PRASADA NAYUDU.

decree of the Privy Council, we think that plaintiff is entitled to a decree for the same sum, namely, Rs. 19,500, in the present case, to which must be added Rs. 3,500 for the seven months between the date of the institution of the suit and the making of the decree, for the judge has decreed payment of the higher rate of Rs. 750 per mensem only from the latter date, and in that respect we do not alter the decree."

As to the charge, while holding that the plaintiff was entitled to have his maintenance charged on the zemindary property or part of it, the Court said :—

"We think, however, that the zemindar is justified in objecting to the decree as framed by the District Judge, inasmuch as it fetters him unnecessarily in the disposition of his property. It is sufficient that the decree should make the maintenance chargeable on certain villages; and if the parties cannot agree, we must ask the judge to find what particular property will form sufficient security."

The main question raised before their Lordships was whether the cross-appellants were right in maintaining their claim to arrears of maintenance.

Branson, for the cross-appellants, contended that the High Court ought to have awarded arrears of maintenance for twelve years before suit, deducting the amount admittedly paid by the zemindar pending the appeal to Her Majesty in the former litigation. The High Court was right so far as it held that the right to maintenance is primarily a right to be maintained out of the current income of the property. But there is no sufficient authority for the proposition that if the person chargeable neglects to pay that maintenance which is due by him there is no legal claim to the arrears. The circumstances might be such as to shew that the claim was temporarily waived. But here the evidence shewed that the right was denied, and payment wilfully and wrongfully withheld. Under such circumstances, at all events, an action for arrears lies. Reference was made to *Rajah Pirthee Singh* v. *Ranee Raj Kower* (1); Vyavastha Darpana, p. 384; *Lakshmipathi* v.

(1) (1873) L. R. Ind. Ap. Supp. vol. 203.

Kandasami (1) ; *Sakvarbai* v. *Bhavanji* (2) ; *Mahalakshmamma* v. *Venkataratnamma* (3) ; *Jivi* v. *Ramji* (4) ; *Narayanrao Ramchandra Pant* v. *Ramabai* (5) ; *Raghubans Kunwar* v. *Bhagwant Kunwar*. (6)

Mayne, for the cross-respondents, contended that the High Court was right under the special circumstances of the case in rejecting the claims for arrears for the reasons assigned in the judgment appealed from. There was no sufficient evidence that they had been wrongfully withheld. The evidence rather pointed to their having been intentionally waived under the circumstances of litigation and in the prosecution of an absolute title to a portion of the estate, a claim which was inconsistent with that to maintenance, which involved a charge on the estate of a third party, and a personal liability of its holder, whose title to the whole is admitted by a maintenance claim. Reference was made to *Narayanrao Ramachandra Pant* v. *Ramabai* (7) ; *Motilal Pramath* v. *Bai Kashi* (8) ; *Seshamma* v. *Subbarayadu*. (9)

The judgment of their Lordships was delivered by

1900
July 11.

SIR HENRY DE VILLIERS. These are appeals and cross-appeals against a decision of the High Court of Madras, which modified a decision of the District Court of Kistna. Two separate suits for maintenance had been brought in the lower Court against the zemindar of Challapalli by his two younger brothers respectively, but all the proceedings in the two cases were identical, and the observations of their Lordships upon the one case will be equally applicable to the other.

The appellant, the defendant in the lower Court, is the eldest son of Ankinidhu, late zemindar of Challapalli, who died on April 6, 1875, leaving three sons, namely, the defendant and the two plaintiffs. Not long after their father's death quarrels arose between the brothers, and in April, 1880, one of the

(1) (1892) Ind. L. R. 16 Mad. 54.
(2) (1864) 1 Bomb. H. C. 194.
(3) (1882) Ind. L. R. 6 Mad. 83, 84.
(4) Ind. L. R. 3 Bomb. 207.
(5) (1879) L. R. 6 Ind. Ap. 114 ; S. C. Ind. L. R. 3 Bomb. 415.
(6) (1899) Ind. L. R. 21 Allah. 183.
(7) L. R 6 Ind. Ap. 114.
(8) (1892) Ind. L. R. 17 Bomb. 45.
(9) (1893) Ind. L. R. 18 Mad. 403, 405.

J. C.

1900

RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU v. RAJA YARLAGADDA DURGA PRASADA NAYUDU.

younger brothers brought an action for partition against the present appellant in the District Court of Kistna. That Court decided that the zemindary estate was impartible, but awarded to the then plaintiff one-third of certain property, not forming part of the zemindary estate. That judgment was reversed by the High Court of Madras, but, on appeal to Her Majesty in Council, the judgment of the High Court was reversed on May 1, 1890, and that of the District Court was restored. In April, 1891, the two younger brothers instituted the present suit for maintenance. The plaints claimed—(1) maintenance at the rate of Rs. 2,000 per month; (2) Rs. 5,31,938 for arrears of maintenance; (3) Rs. 12,000 towards the marriage expenses of the plaintiffs' children; (4) the provision of suitable houses, lands, utensils, and furniture for the plaintiffs; and (5) an order declaring that the arrears and future maintenance constitute a charge upon the Challapalli estate, or such portion thereof as may seem proper to the Court. The District Court by its judgment decreed future maintenance at the rate of Rs. 750 per month, and arrears of maintenance for twelve years at the rate of Rs. 500 per month, the whole to be a charge upon the zemindary estate. The District Judge found that the claim for maintenance was not affected by the decree in the partition suit, and was not barred by limitation. In regard to the claim for arrears of maintenance, he held that, although no demand had been made, maintenance had been practically withheld and could be recovered for a period of twelve years immediately preceding the institution of the suit. Against this judgment the zemindar appealed, while the plaintiffs filed objections. The judges of the High Court agreed with the lower Court upon all points except as to arrears of maintenance and as to the maintenance being a charge upon the whole of the zemindary estate. They held that the arrears were not claimable, except a certain sum actually received by the plaintiffs under a previous order of the High Court, and they reduced the amount of arrears from Rs. 56,000 to Rs. 23,000. As to the question whether the maintenance decreed should be a charge upon the whole of the zemindary, they say: "We think that the zemindar is justified in objecting to the decree as framed

by the District Judge, inasmuch as it fetters him unnecessarily in the disposition of his property. It is sufficient that the decree should make the maintenance chargeable on certain villages." The defendant now appeals against the judgment of the High Court in so far as it allows any maintenance at all; while, on the other hand, the plaintiffs respectively cross-appeal against that part of the judgment which refuses further specific relief and reduces the amount of the arrears of maintenance.

Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit in which reference has already been made. It is true that in that suit a decree was made for the partition of a portion of the family property, but it was a very inconsiderable portion, and had no relation whatever to the zemindary estate. As to the zemindary estate, this Board held that it was impartible, and the consequence is that the plaintiffs, as the younger brothers of the zemindar, retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir. (1) In regard to the amount of maintenance, the judges of the High Court very properly refused to disturb the finding of the District Judge, whose experience in the district they fully recognise.

The only question upon which there has been any serious argument before their Lordships is whether the arrears of maintenance awarded by the lower Court ought to have been reduced by the High Court. The plaintiffs no longer object to the arrears being limited to the period of twelve years, but they claim that for that period at all events they should receive the amount awarded to them. Among their reasons for the view that arrears of maintenance are not claimable, the learned judges of the High Court state the following: "The District Judge has granted arrears at the rate of Rs. 500 per mensem for twelve years prior to the institution of the suit. In this we

(1) See *Sartaj Kuari* v. *Deoraj Kuari*, (1887) L. R. 15 Ind. Ap. 51, 62; S. C. Ind. L. R. 10 Allah. 285.

J. C.

1900

RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU v. RAJA YARLAGADDA DURGA PRASADA NAYUDU.

think he was wrong. The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable. The circumstance, however, that a person entitled to maintenance has not in fact been maintained by the person chargeable does not necessarily give him a right of action for arrears. On proof of failure to maintain, without more, he cannot be said to become a creditor of the person in default. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled." In support of these views the learned judges refer to two cases: *Jivi* v. *Ramji* (1) and *Sri Maniyam Mahalakshmamma* v. *Sri Maniyam Venkataratnamma* (2); but these cases by no means support the conclusions at which the High Court has arrived. The first of them, decided by the High Court of Bombay in 1879, was a case in which a Hindu widow sued her late husband's undivided brother for four years' arrears of maintenance. The High Court, reversing the judgment of the District Court, held that the widow had a legal right, irrespective of demand and refusal, to maintenance, and may recover arrears for any period not excluded by the law of limitation. The question raised in the second case, which was decided by the High Court of Madras in 1882, was whether a Hindu widow entitled to maintenance can have the payment thereof secured by a charge on part of the inheritance in the hands of the heir. The question was decided in the affirmative, and the learned judges in the course of their judgment made the following remaks (3): "It is argued that the claim to past maintenance ought to have been disallowed, but we are unable to assent to this view.....Although no previous express demand is necessary to sustain a claim to past maintenance, and it is only evidence of a wrongful withholding of maintenance which, as observed by the Privy Council in Ind. L. R. 3 Bomb. 421, is the ground of liability—the Subordinate Judge has also found in this case that demands were made but not complied with since 1876." The case before this Board to which reference

(1) Ind. L. R. 3 Bomb. 207. (2) Ind. L. R. 6 Mad. 83.

(3) Ind. L. R. 6 Mad. 84.

was made in the case last cited was decided is 1879. Three questions were raised before their Lordships, namely, whether the suit of the plaintiff, a Hindu widow, for maintenance and arrears under a will is barred by limitation on the expiration of twelve years from the testator's death, whether she had disentitled herself to maintenance by living apart from the son, and whether the suit could be maintained notwithstanding that there had been no demand and refusal of the maintenance. Their Lordships answered the two first questions in the negative, and as to the third question they made the following observations: "It was said that no action could be maintained because a demand and refusal had not been proved. There is no evidence that a specific demand was made for the maintenance, but the Subordinate Judge has found, and the High Court have not disagreed with him, that the maintenance was refused; and taking all the circumstances of this family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it." Among the circumstances thus taken into consideration was the antecedent litigation which shewed the state of hostility between the members of the family and accounted for the withholding of the maintenance. The case is no authority for the proposition that in order to recover arrears of maintenance it is necessary to prove a demand for each year's maintenance as it became payable. On the contrary, the fair deduction from this and other cases cited is that, while the learned judges of the High Court were right in holding that non-payment of maintenance to a person entitled thereto does not necessarily give him a right of action for arrears, it constitutes prima facie proof of wrongful withholding. It is only upon a full consideration of all the circumstances of each particular case that it is possible to decide whether such prima facie proof has been rebutted. The only case which might appear to conflict with this view is that of *Motilal Pramnath* v. *Bai Kashi*. (1) In that case the learned judges of the High Court of Bombay admitted that a withholding of maintenance might be proved otherwise than

(1) Ind. L. R. 17 Bomb. 45.

J. C.

1900

RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU v. RAJA YARLAGADDA DURGA PRASADA NAYUDU.

by a demand or refusal, and if they intended moreover to decide that non-payment of maintenance when due does not constitute prima facie proof of such withholding, their Lordships are unable to agree with the decision. In the present case it is said that the claim for maintenance is inconsistent with the claim for partition in the previous action, and in one sense this may be true, but it by no means follows that the right to arrears of maintenance was forfeited in consequence. It is not alleged that the plaintiff did not act in perfectly good faith in instituting his suit for partition, and the fact that there was considerable diversity of opinion in the different Courts which had successively to decide the case shews that the plaintiff's claim for partition was not wholly baseless. So long as that action was pending the plaintiff could not well claim maintenance except as a provisional means of support pending the appeal to Her Majesty in Council. The defendant, on the other hand, if he had been willing to allow full maintenance in lieu of a partition, might have made an unconditional offer of a reasonable amount of maintenance, or he might have set aside a certain sum for the purpose. It is true that, in an affidavit, he made a vague admission of his liability, but he never went any further. It is reasonably clear from the proceedings in the present suit that he would not have been willing to provide maintenance at the rate of Rs. 750 per month, if that sum had been demanded in the previous suit instead of a decree for partition. One of the express grounds stated by him for his appeal in the present suit to the High Court was, that "even granting that the plaintiff is entitled to maintenance, the rate of maintenance awarded to him is excessive." And among his grounds of appeal to Her Majesty in Council are the following: "(4.) the High Court failed to notice that it is for the plaintiff to set up and prove any custom entitling him to maintenance, and that he has not done so; (5.) the High Court erred in thinking that there was any admission by the defendant of his liability for maintenance; (10.) the amount of maintenance awarded is excessive." After these objections, and in view of the strained relations between the brothers ever since their father's death, it is impossible to

believe that the defendant would have paid maintenance at the rate of Rs. 750 per month, or at any other rate, if it had been demanded from him in the first instance. He does not allege in his defence, nor is there any evidence, that he was in any way prejudiced by the form of the previous action. It may well be that, if he had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action. But, without some such ground of defence, it is impossible to hold that the younger brothers of the defendant have forfeited an undoubted right merely because they were in the first instance advised to institute a wrong suit, and did not claim their maintenance as it fell due. The District Court, therefore, properly held that the younger brothers were entitled to recover arrears for any period not excluded by the law of limitation.

The result is that, in the opinion of their Lordships, the defendant's appeals should be dismissed, and the plaintiffs' cross-appeals allowed to this extent, that the judgment of the District Court for arrears be restored and the defendant ordered to pay the plaintiffs' costs of appeal to the High Court, and their Lordships will humbly advise Her Majesty accordingly. The costs of these appeals will also be paid by the defendant, but the registrar will be directed not to include in such costs any expenses occasioned by the printing of irrelevant or unnecessary matter in the bulky record presented to their Lordships.

Solicitor for appellants : *R. T. Tasker.*

Solicitors for respondents : *Frank Richardson & Sadler.*

J. C.* SUBBARAYER AND OTHERS . . . . . PLAINTIFFS;

1900

AND

July 3, 21. SUBBAMMAL AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Will—Construction—Gift to Adopted Son—Persona Designata.

Where a testator recited in his will that he had been keeping a minor as his adopted son, and thereby gave properties to him absolutely, describing him as adopted son :—

Held, that by the true construction of the will the gift was not conditional upon adoption having been effected.

APPEAL from a decree of the High Court (March 18, 1898) affirming a decree of the District Judge of Coimbatore (March 31, 1897).

The suit was brought by the appellants to set aside the alleged adoption of the second defendant to one Kuppier, deceased, and to declare the invalidity of a will said to have been made by Kuppier in favour of the second defendant. Both Courts found in favour of the will as a matter of fact, and also in favour of the adoption as a matter of law, though upon different grounds.

The point decided in appeal was whether, according to the true construction of the will set out in their Lordships' judgment, there was a valid gift to the second defendant as a persona designata, or whether it was conditional upon his adoption as a son to the testator having been validly effected. The First Court decided this question in favour of the second defendant as a persona designata; the High Court held it unnecessary to decide it, as the adoption was complete and valid.

Mayne, for the appellant, contended that the will was only intended to operate in favour of the second defendant when he

**Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY and SIR RICHARD COUCH.

was duly adopted. The gift should be construed as conditional upon the adoption having been validly effected. He cited *Fanindra Deb Raikat* v. *Rajeswar Dass* (1); *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (2); the *Pittapur Case*. (3) In the case in 3rd Ind. Ap. the testator evidently intended the boy to take under the will whether he was adopted or not; here, unless the boy were adopted, he could not perform the acts required of him by the testator. The gift in this case is conditional upon the donee having obtained the qualification which entitled him to do what was required of him.

C. W. Arathoon, for the first three respondents, contended that the boy was intended to take as a persona designata under the will regardless of his having obtained the status of an adopted son. The gift was to him absolutely in any event.

Mayne replied.

The judgment of their Lordships was delivered by

1900
July 21.

LORD MACNAGHTEN. In this case their Lordships have only to consider the meaning and effect of the will of one Kuppier, which is found by both Courts below to have been executed when the testator was of sound disposing mind. Mr. Mayne, who appeared for the appellants, admitted that if the decision of the Court was against him on the construction of the will, success on other points would be of no avail. The question is whether the minor respondent, Venkataramanier, is entitled to inherit under the will, assuming that he was not validly adopted by the testator.

The will is in the following terms :—

"Will left on the 26th February, 1896, corresponding to 16th Masi of Manmatha year, by me Kuppier, son of Venkatarayer, Brahman by caste, cultivator, residing at Chinna Dharapuram, Karur Taluq. Whereas I possess the undermentioned immovable and movable properties, money, outstandings and debts, whereas I, having no issue, have been keeping Venkataramanier, a minor, aged about 10, son of

(1) (1885) L. R. 12 Ind. Ap. 72. (2) (1876) L. R. 3 Ind. Ap. 253.
(3) (1898) L. R. 26 Ind. Ap. 83.

J. C.

1900

SUBBARAYER v. SUBBAMMAL.

Venkatadasappaiya of Andan Kovil, Brahman, cultivator, who is my brother-in-law, as adopted son and protecting him for the last three years, whereas I am now seriously ill, whereas my mother Venkalakshmi Ammal is in her dotage, and whereas my adopted son, the said Venkataramanier is a minor and consequently incapable of managing the said properties and of protecting us, my wife Subbammal shall, until the said minor becomes a major, administer the said properties as guardian of the said minor, discharge the debts, maintain the undermentioned charities which I have been conducting, bring up the said minor, have his thread ceremony, marriage, &c., celebrated, maintain me and my mother Venkalakshmi Ammal till our lifetime, and after our demise have our funerals, &c., performed for us by the said minor. Afterwards the said minor on his attaining majority shall take charge of the said properties, debts, &c., and until the lifetime of the said Subbammal he shall as per her orders look after the said properties and discharge the debts, also maintain the undermentioned charities and after the said Subbammal's lifetime he shall perform her funerals, &c., and possess and enjoy with all rights the said properties, &c., from generation to generation so long as the sun and moon last, and maintain and conduct the said charities. Thus have I of my own accord and with my freewill and consent executed this will.

"(Signed) Kuppier."

It appears to their Lordships that the gift to the minor is not conditional on adoption. The testator no doubt refers to the minor as his adopted son, but he explains what is meant by that expression by stating that he had been keeping the minor "as adopted son"—that is, with a view to his adoption.

The case on which Mr. Mayne principally relied was the case of *Fanindra Deb Raikat* v. *Rajeswar Dass.* (1) There this Board had to construe an angikar-patra which contained an allegation of the adoption of the person who claimed to inherit, and then proceeded to make a statement which might be construed either as a disposition of property or as a decla-

(1) L. R. 12 Ind. Ap. 72.

ration of the consequences flowing from adoption. Their Lordships held that the author of the angikar-patra had no power to adopt a son who would succeed to the estate; and, on the language of the particular instrument before them, they held it was not a disposition of property, but only a statement of what would have happened if there had been an adoption in fact and no angikar-patra had been executed.

The language of one instrument does not afford much assistance in the construction of another. Their Lordships, however, may observe that the language of the will in the present case is more like that of the will in the case of *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (1), to which Mr. Mayne also referred. There it was held that the gift of the testator's property to a person whom the testator declared he had adopted took effect, although in consequence of the proper ceremonies not having been performed by the testator's widows the adoption might not be in all respects complete.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the respondents appearing on that appeal.

Solicitors for appellants: *Lawford, Waterhouse & Lawford.*

Solicitors for first three respondents: *T. L. Wilson & Co.*

(1) L. R. 3 Ind. Ap. 253.

J. C.* MOUNG THA HNYEEN . . . . . PLAINTIFF;

1900

AND

July 6.

MOUNG PAN NYO . . . . . DEFENDANT.

ON APPEAL FROM THE SPECIAL COURT OF LOWER BURMA AT RANGOON.

Practice—Concurrent Findings of Fact.

Concurrent judgments of the Courts below on matters of fact, although open to argument before their Lordships, will not be interfered with unless very definite and explicit grounds for that interference are assigned.

APPEAL from a decree of the Special Court at Rangoon (April 26, 1899) affirming a decree of the judge of Moulmein (Sept. 23, 1898).

The issue in this case was one of fact, whether the appellant was entitled to carry the sale proceeds of certain logs of timber specially marked as belonging to one Moung Pa Thaw, his debtor, to the credit of his account with that debtor, and in reduction pro tanto of that debtor's liability; or whether the respondent had a prior lien on those logs as against Moung Pa Thaw, and had assigned the logs to the appellant on terms that he should be paid the amount of his lien first, and that only the balance remaining thereafter should be credited to Moung Pa Thaw.

The Courts below decided in favour of the respondent.

Haldane, Q.C., Lowis (of the Rangoon Bar), and *M'Carthy*, for the appellant.

Cowell, for the respondent, was not heard.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. This case has been very ably argued for the appellant, and there is no doubt a great deal of obscurity and some puzzling circumstances in it. But it has been the

**Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

subject of an extremely elaborate and careful judgment by the First Court below, and that judgment has been examined by the Court of Appeal, who have agreed with the First Court. Although acute criticisms have been made upon some points in the case, there has been nothing to shew that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognised here, and commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned. In all probability their Lordships would be doing a great deal more harm than good if they were induced to disturb judgments arrived at by the local judges on such criticisms as have been assigned in this argument.

Their Lordships will humbly recommend Her Majesty to dismiss the appeal ; and the appellant must pay the costs.

Solicitors for appellant : *A. H. Arnould & Son.*

Solicitors for respondent : *Richardson & Co.*

J. C.* HODGES AND ANOTHER . . . . . DEFENDANTS;

1900

AND

June 28, 29; *July* 3, 21. DELHI AND LONDON BANK, LIMITED . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Principal and Surety—Stipulation that Surety should not be discharged by Time given to Debtor—Pardanashin.

The appellants, in becoming sureties to the respondent bank, covenanted that though as respects the principal debtor they should be considered as sureties only, yet as regards the bank they should "be considered as principal debtors," so as not to be exonerated from liability by any dealings between the bank and the principal debtor, which would otherwise have that effect:—

Held, that the appellants became liable as principals to the bank immediately on the default of the principal debtor, and were not discharged by reason of time having been given to him. The effect of the deed being plain, neither appellant could escape liability except by proof of misrepresentation or undue influence.

A woman cannot be held to be a quasi-pardanashin. If she is not actually a pardanashin, sufficient incapacity for business must be proved in order to throw upon those dealing with her the duty of taking special precautions.

APPEAL from a decree of the Judicial Commissioners of Oudh (Feb. 4, 1898) reversing a decree of the Additional Circuit Judge of Lucknow (April 14, 1896).

The suit was brought under the circumstances stated in the judgment of their Lordships upon a loan transaction by the Delhi Bank againsi five defendants, of whom two made no defence, and as regards another the suit was dismissed on a preliminary objection. The remaining two defendants, Hodges and Craster, who are the appellants, raised the question whether they were released from their liability as sureties by the fact that the bank had given time to the principal debtor. Upon this point the Courts in India have differed: the original

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY DE VILLIERS.

Court considered that the sureties were released; the Appellate Court considered that they were not.

A further question was raised by the appellant Hodges, who represented Mrs. Hodges, deceased, one of the co-sureties, whether Mrs. Hodges was entitled to be relieved from her contract as being a person similarly situated to a pardanashin, and, therefore, entitled to the special protection which the law affords to persons in that condition.

The Civil Judge discharged from liability the appellant Craster and Mrs. Hodges' estate. He found that Katherine Hodges was not illiterate or uneducated, and was not a pardanashin or a quasi-pardanashin lady; he said there was absolutely no evidence to shew that the bank was aware of or a party to the exercise of any undue influence over or misrepresentation to her. He was inclined to believe that Mrs. Oldham, the borrower's wife, did explain the deeds to her mother, Mrs. Hodges, but he considered that, with reference to his previous findings, it rested on Craster to prove that Mrs. Hodges signed the documents without understanding them, and there was no such proof on his behalf. He also found that both Mrs. Hodges and Captain Craster signed as sureties, and not as principals. He did not notice or give any effect to the concluding clause of the bond, but found that the bank had given time to the debtor without the consent of the sureties, and held that by so doing it had discharged the latter.

The judgment of the Judicial Commissioner's Court found that Mrs. Hodges was in an independent position, and not under the influence of her son-in-law. Her act was a reasonable and ordinary one, and she executed the bond with her full and free consent.

As to Craster, the Appellate Court found that there was nothing in the nature of a suretyship inconsistent with the execution of the joint and several bond sued upon, and that there was no misrepresentation by the manager of the bank conducing to the execution thereof.

As to the effect of the covenants in the bond, the Court said: "It appears to me that on the first of these covenants Mrs. Hodges and Mr. Craster were not principal debtors to the

J. C.

1900

HODGES v. DELHI AND LONDON BANK.

bank, but that they were liable only in default of payment by Arthur Oldham. That being so, they were nothing more than sureties on the face of the deed, and they can claim the benefits of the ordinary law applicable to sureties. If these persons are not principal debtors, the latter covenant cannot make them so. Nor can it make applicable to them a law which applies only to principal debtors. Had Mrs. Hodges and Mr. Craster covenanted to pay the bank and been primarily liable to the bank, the latter covenant might perhaps have operated to secure for the bank the benefits contemplated by s. 32 of the Contract Act. That section contemplates two contracts, the terms of which are conflicting. In this case there is substantially no conflict, Mrs. Hodges and Mr. Craster having only bound themselves conditionally and not absolutely."

As to the plea that the bank had discharged the sureties by giving time to the principal, the Court was of opinion that there was no contract to grant time from September, 1886, to December, 1886, and that as to the extention of time from July, 1888, to May 1, 1889, the contract to grant it was between the bank and Mrs. Oldham, and not between the bank and Oldham.

Sir W. Rattigan, Q.C., Aston, and *De Gruyther*, for the appellants, who had lodged separate cases, contended that Mrs. Hodges was a quasi-pardanashin lady; that is, that assuming that she was not actually a pardanashin as that term is understood in India, in the strict sense of the term, she was nevertheless in a like position. She was, from the circumstances in which she was placed, and from the extent of her mental capacity and experience of life, equally entitled with a pardanashin to the equitable relief afforded to pardanashin ladies and other persons similarly situated. The deed was improvident and she was living with and dependent on the Oldhams, who stood to her in a fiduciary position. Reference was made to *Lachmi Pershad* v. *Narendro Kishore* (1); *Wajid Khan* v. *Raja Ewaz Ali Khan* (2); *Mariam Bibi* v. *Sakina* (3);

(1) (1891) L. R. 19 Ind. Ap. 9. (2) (1891) L. R. 18 Ind. Ap. 144.

(3) (1891) Ind. L. R. 14 Allah. 8.

Lalli v. *Ramprasad*. (1) In other words, the plaintiff was bound to shew that the deed sued upon and the transaction were fully explained to Mrs. Hodges and understood by her, so that it could be found to be the voluntary and well-understood act of her mind. The evidence was wholly insufficient for that purpose. This improvident transaction required legal advice, and should have been shewn to be one which was intended by her with full knowledge of the consequences: see *Davies* v. *London and Provincial Marine Insurance Co.* (2), an authority which was strongly relied upon: see also Indian Contract Act (IX. of 1871), ss. 128 and 135. As to the extent of liability, the Court below was wrong in holding that Mrs. Hodges was the ostensible owner of the balance of her husband's estate in her possession, and that the appellant was liable to that extent. It was matter of account to what extent the appellant was liable in respect of her estate. As regards the appellant Craster, his case was like that of Mrs. Hodges in that he was not a principal debtor, but only a surety by the terms of the deed. They were both entitled to all the ordinary rights of a surety. Included in those rights was the right to be relieved of liability when the bank by a binding contract with the principal debtor extended the time for the repayment by him of his debt.

Cohen, *Q.C.*, and *Mayne*, for the respondent, contended that there was no ground for saying that the bank had released the sureties. The stipulation taken from them in the deed that they should not be discharged by dealings between the bank and the principal debtor was valid and effectual, and there was nothing in the particular dealings which rendered it inequitable that that stipulation should be enforced against him. It is true that they did not become principal debtors, but only sureties on the execution of the deed. But they became by their own contract principal debtors as soon as the borrower made default in repayment according to the terms of the deed. Reference was made to ss. 2, 8, 10, 128 and 135, of the Contract Act. With regard to Mrs. Hodges, there is no such position recognised by law as that of quasi-pardanashin. The evidence

(1) (1886) Ind. L. R. 9 Allah. 74. (2) (1878) 8 Ch. D. 469.

J. C. 1900 HODGES v. DELHI AND LONDON BANK.

shewed that she was not an actual pardanashin, and did not shew that she was entitled to any special protection: see *Mahomed Buksh Khan* v. *Hosseini Bibi*. (1) On the contrary, she was shewn to be a woman of more than ordinary intelligence and of business capacity and experience. As to costs, reference was made to *Marshall* v. *Willder*. (2)

Sir W. Rattigan, Q.C., replied.

1900 *July*. 21.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appellants in this case were defendants in the suit brought by the respondent bank. They had different defences, and their reasons in support of the appeal are different. For defendants so situated to join in a single appeal is an irregular proceeding and might easily result in inconvenient consequences. But they have been allowed to lodge separate cases, and their Lordships have heard them by separate counsel; and as matters turn out the misjoinder in appeal will not cause any embarrassment.

On January 29, 1886, three documents were executed for the purpose of securing a loan made by the bank to Colonel, then Major, Oldham of the 12th Native Infantry, then quartered at Lucknow. The first is an indenture made between Colonel Oldham of the first part, Katherine Hodges, widow, of Loodiana, and the defendant, Captain Craster, then a lieutenant in the same regiment of infantry, of the second part, and the bank of the third part. After reciting that Rs. 4,500 had at the request of the other three parties been advanced by the bank to Oldham upon an agreement for repayment as thereinafter provided, it is witnessed that the three parties jointly and severally covenant with the bank that Oldham shall pay the principal and interest and the premiums on a life policy by monthly instalments of Rs. 300, beginning on March 10 next; the whole amount to be recoverable on failure to pay any instalment. The last clause of the deed runs as follows:—

"And it is hereby also agreed and declared, that although as between the said Arthur Oldham and the said K. Hodges and J. C. B. Craster, the said K. Hodges and J. C. B. Craster are

(1) (1888) L. R. 15 Ind. Ap. 81. (2) (1829) 9 B. & C. 655.

to be considered as sureties only for the said Arthur Oldham, yet as between the said K. Hodges, J. C. B. Craster, and the said bank, the said K. Hodges and J. C. B. Craster are to be considered as principal debtors to the said bank, so that the said K. Hodges and J. C. B. Craster, their heirs, executors or administrators, or either of them, shall not be discharged or exonerated by any dealings between the said Arthur Oldham, his heirs, executors or administrators, and the said bank, whereby the said K. Hodges and J. C. B. Craster as sureties only for the said Arthur Oldham would have been so discharged or exonerated."

The second of the three documents is a letter written by Mrs. Hodges to the bank. It states that she hands to the bank certain certificates for shares in other banks with a power of attorney to enable the bank to sell them. In the event of her loan account with the bank (joint and several with Oldham and Craster) becoming out of order by infringement of any of the conditions of the bond securing it, the bank may sell for the credit of the loan account. The third document is the power of attorney mentioned in the letter.

On June 8, 1886, Mr. Hodges died, and the appellant Robert Hodges is her administrator. In September, 1886, Colonel Oldham failed to pay the instalment due to the bank. He applied for delay, but was informed by the bank that it could not be granted without the consent of his sureties. Craster consented to a delay of four months, but no consent could be given on the part of Mrs. Hodges' estate, to which no representative had then been appointed.

After this much time was consumed in applications by the bank for payment and proposals on the part of Oldham for delay. On July 26, 1888, Mrs. Oldham, wife of the colonel, executed a bond whereby she charged her interest under her father's will in consideration of the forbearance of the bank from suing Oldham, Hodges, and Craster till May 1, 1889. This suit was brought on May 2, 1889, to obtain payment from the parties personally liable and from the estate of Mrs. Hodges.

The defences raised by Robert Hodges which are now

J. C.

1900

HODGES
v.
DELHI AND
LONDON
BANK.

material are these: First, he says that Mrs. Hodges was a quasi-pardanashin lady, of no education, unable to read or write English, and quite incapable of understanding the terms of the three instruments in question, which were not explained to her, and on which she had no independent advice. Secondly, he says that her execution of the instruments was obtained by undue influence and misrepresentation on the part of Colonel and Mrs. Oldham. Thirdly, that the bank had given time to the principal debtor, and had thereby discharged the surety.

The fourth and fifth issues stated by the First Court were as follows:—

"4. Was Katherine Hodges a quasi-pardanashin lady and uneducated?

"5. Did Katherine Hodges execute and understand the documents alleged to have been executed by her?"

The First Court answered the fourth issue in the negative. On the fifth issue the learned judge thought that Mrs. Oldham explained the deeds to Mrs. Hodges, and he says it is apparent that Mrs. Hodges was not a person to sign deeds without first knowing what they contained. He therefore answered the fifth issue in the affirmative. But this latter finding must be taken as qualified by a subsequent part of his judgment.

It will be convenient here to state the position and character of Mrs. Hodges. The main features are summed up shortly in the judgment delivered by one of the learned judges in the Judicial Commissioner's Court:—

Mrs. Hodges was by birth a Kashmiri, sister of a well-known Kashmiri gentleman, a political pensioner. Mrs. Hodges was employed in the Karpurthala estate and died during the Mutiny. Mrs. Hodges continued to live in Ludhiana till October, 1885, staying during the hot weather with the Reverend J. Woodside at Landour. In October, 1885, she began to live with her son-in-law, Major Oldham, at Lucknow. She was a woman of superior mental capacity. She could not understand English, but could read and write Urdu in the Roman character. Her habits were those of a native in this country. She did not appear before strangers, but had a limited circle of friends, either natives of the country or

Europeans connected with natives of the country, before whom she appeared. According to Mr. Woodside, though Mrs. Hodges had great ability, she was incapable of doing business such as getting interest on her Government promissory notes. According to Colonel and Mrs. Oldham, she managed all her affairs. The respondent Hodges has admitted that with the exception of certain remittances to England Mrs. Hodges transacted all other business herself. There can be no doubt that for twenty-seven years she managed her affairs with prudence and success, possibly with some assistance from friends."

A few particulars may usefully be added. Her marriage with Mr. Hodges is said to have taken place in the year 1838, when she must have been hardly fifteen years old. It was solemnized by the Rev. Mr. Rogers according to the rites of the Presbyterian Church. She then took the Christian name of Katherine, and retained it during her life instead of her birth name of Piyari Phundo Khanum. Her children, five in number, were all baptised into the Christian Church. Her husband was killed at Delhi in 1857. It does not appear that she ever ceased to be a Mahomedan in religion, and she clearly was of that religion both before her marriage and during her widowhood. But the statement that her habits were those of a native Indian must be taken subject to the qualifications necessarily resulting from the events of her life, and to the fact that during widowhood she resided much with Mr. Woodside, a Christain missionary, and appeared uncovered before his male servants as well as her own.

In this part of the case there is no discrepancy in the evidence except on some small immaterial details, and none at all in the findings of the two Courts. It is abundantly clear that Mrs. Hodges was not a pardanashin. The term quasi-pardanashin seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the pardanashin class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to pardanashins must be extended to her. The contention is a

J. C.

1900

HODGES
v.
DELHI AND
LONDON
BANK.

novel one, and their Lordships are not favourably impressed by it. As to a certain well-known and easily ascertained class of women, well-known rules of law are established, with the wisdom of which we are not now concerned. Outside that class it must depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute. Mrs. Hodges was an independent woman of more than ordinary capacity for, and experience in, dealing with property. It would be very unjust to hold that the bank was bound to treat her on any other footing.

As regards the allegation that the security given by Mrs. Hodges was procured by undue influence and misrepresentation on the part of the Oldhams, there is absolutely no evidence beyond the facts that she was residing with them, that Mrs. Oldham was her favourite daughter, and was in the habit of explaining English expressions to her, as she did on the occasion in question. No formal issue was stated on this point, but it has been much pressed, though not so much at this bar as in the Courts below. The Judicial Commissioner examines the matter very carefully, and is at pains to shew, not only that Mrs. Hodges was freely consenting to the transaction, but that, having regard to the family circumstances, it was not at all an unreasonable thing for her to assist Colonel Oldham as she did.

On this important part of the case their Lordships have no difficulty in expressing agreement with both the lower Courts. In what comes afterwards it is difficult to follow them. The District Judge goes on to try the eighth issue. Did Katherine Hodges execute the bond as a principal or as a surety? Now when it had once been found that she was a competent woman of business and understood the deed and executed it willingly, nothing remained for the purpose of ascertaining her position except to construe the deed, unless there had been some special case set up making a distinction between one part of the deed and another, of which there is no trace in the pleadings, the issues, or the judgments. The deed is not open to

any serious doubt. Mrs. Hodges covenants that Oldham shall pay. That makes her a surety, liable to pay the whole immediately on Oldham's default. She is a surety with all the rights of a surety to be indemnified by him and to have contribution from her co-surety. But, as regards the bank, she was to be considered as a principal debtor, not so as to be liable while Oldham was meeting the instalments, but so as not to be discharged by dealings between the bank and Oldham which were otherwise calculated to discharge a surety. The District Judge, however, goes to the extrinsic evidence, and he decides that Mrs. Hodges was a surety pure and simple. His only grounds are, partly some loose general statements, made most of them subsequent to the deed, by Colonel Oldham and Mr. Langdon, the bank manager, that she was surety, which is quite true, and partly because, from the evidence of Mr. Woodside, it is apparent that she never would have agreed to stand as a principal.

The learned judge can hardly have been serious in treating Mr. Woodside's opinion as evidence. But great stress has been laid at this bar, and was evidently laid in the Courts below, on the hardship which the last clause of the deed inflicts upon the sureties, and on the consequent probability that they would not have borne their part in the transaction if its exact effect had been explained to them. That its exact legal effect was not explained is probable enough, seeing that counsel at this bar found it difficult to say what effect it would have except the effect of avoiding the rule by which the sureties are now seeking to protect themselves. That rule, though established in English law, and imported into the Indian Contract Act, s. 135, without express mention of all the qualifications which attach to it in England, has often operated as a surprise and hardship on creditors. It has long since become a common thing, at least in England, for prudent lenders of money to prevent its application by provisions like that which is found in the document under consideration. Whether that practice has been so common in India is not apparent. But it has been the practice of the plaintiff bank, and this deed was copied from a printed form. Neither of the

J. C.

1900

HODGES
v.
DELHI AND LONDON BANK.

Courts below intimates that there is anything unusual in the provision, nor that in this particular case its insertion was in any way improper or calculated to deceive.

It seems to their Lordships not only not probable but highly improbable that a lady who was knowingly and willingly making herself liable for the whole debt, in the only too likely event of Colonel Oldham's default, should draw back from that engagement on being informed that if it so chanced that the bank gave indulgence to Colonel Oldham of a kind which is usually calculated to benefit all the debtors alike, her liability to the bank would still continue. The addition to her responsibility was a minute one. Having swallowed the camel she would hardly strain at this gnat.

Nevertheless, the District Judge having found that Mrs. Hodges executed the deed as surety, as she undoubtedly did, proceeds to treat it as if there were nothing else in it, and holds that she was discharged when time was given to Colonel Oldham. He does not bestow any examination on the question, or even put the question, whether as regards explanations given to Mrs. Hodges, or as regards her understanding, there is any different evidence applicable to the final clause of the deed from that which applies to the deed as a whole and which convinced him that she understood it.

On this question of suretyship the Judicial Commissioner's Court arrives at the same conclusion in a different and more legitimate way, i.e., on the construction of the deed. The judgment lays it down that inasmuch as the prior part of the deed created Mrs. Hodges and Captain Craster sureties, the latter part cannot make them principal debtors. Their Lordships cannot understand this argument, nor was it supported at this bar. They have above given their view of the meaning of the deed.

The Judicial Commissioners, however, did not support the District Judge, because they thought that the bank did not contract with Colonel Oldham to give him time. It seems, however, to their Lordships that, having taken Mrs. Oldham's security, as the result of a correspondence with her husband, in consideration of forbearance from suing the three debtors,

the bank effectually precluded itself from suing between July, 1888, and May, 1889. If they could agree with either Court on the effect of the deed, they would hold that Mrs. Hodges was discharged; but as they think that the construction of the High Court is wrong, and that the District Judge is wrong in disregarding the final clause of the deed, they must affirm the liability of her estate to the bank.

Captain Craster's case is different and much more simple. His personal position is in no way peculiar. He was a man living in the world, thirty-two years of age, and had been working with his regiment for about three years. He does not allege any improper influence on the part of his superior officer, Colonel Oldham, who procured his execution of the deed. His case is that Langdon, the bank manager, misled him as to the nature of the deed. This is his account of what happened with Langdon.

"I saw Mr. Langdon in his office and said, 'Colonel Oldham tells me that he is desirous of obtaining a loan from your bank, and I have come down to see you regarding the matter.' I said, 'Do you consider that if I stand security to your bank for so large a sum I shall be incurring any unnecessary risk?' Mr. Langdon replied 'No.' He said, 'Mrs. Katherine Hodges will be security with you. She is lodging bank shares as extra security. Colonel Oldham's life will be insured for a sum of Rs. 14,000, and Colonel Oldham will repay the loan at the rate of Rs. 300 per mensem.' I said, 'Well, you must recollect I have no other means besides my pay, and should anything happen to prevent Colonel Oldham paying up I can't do so.' Mr. Langdon said, 'In the face of the security of Mrs. Hodges, and the shares that she has lodged, and also Colonel Oldham's life being insured, I do not see how you can run any great risk, since Colonel Oldham is paying Rs. 300 a month, and in the event of his death we get the Rs. 14,000 life insurance.' I said, 'Very well, you accept me as a co-surety for the amount.' He said, 'Yes, a deed will be drawn up by which you will become surety to the bank.'"

Langdon says that this account is correct in the main, but he will not speak to every detail; afterwards adding that he is convinced that he told Captain Craster that he would be

J. C.

1900

HODGES v. DELHI AND LONDON B ANK.

a principal debtor; only that the bank would not call upon him unless Oldham failed.

The deed was brought to Craster for his signature by Oldham on the rifle range at Lucknow. He executed it without making any attempt to read it, relying, as he says, on Oldham, who told him that it was the bond drawn up in accordance with his agreement made with Langdon. As to the tenor of the deed he says:—

"I understood the liability of a principal to be greater than that of surety. I object to being called a principal debtor. Had I read the passage in Exhibit A 1, 'are to be considered as principal debtors to the said bank,' I would never have signed Exhibit A 1. The said passage is quite plain to me. I have borrowed money once of the bank. I had to sign and get a surety also. I can't remember if that transaction was prior to the one in suit. The look of the paper I signed for that transaction was something like Exhibit A 1. Had a stamp above and writing below. I did not read the paper for that transaction. I repaid the money."

Colonel Oldham says that he told Craster what Langdon had told him—that all would be jointly and severally liable. "The bank may come down on you directly without reference to me." And again, "I took the bond to him myself. I did not read it to him. I explained it to him fully that he was responsible irrespective of me. It was fully explained to him that he would jointly and severally be liable."

In fact, both Langdon and Oldham, if they correctly remember what they said, appear to have represented the liability of the sureties, not as something less, but as something greater than it actually was—namely, as an immediate liability to the bank instead of one dependent on Oldham's default.

Captain Craster also relies on Langdon's refusal to give time upon Oldham's first application without consent of the sureties. That, however, cannot affect the legal rights of the parties; and, indeed, at this bar it is only used in a legitimate way, as shewing Langdon's real belief that Craster was a surety pure and simple, and so lending probability to Craster's statement that Langdon had misled him into believing the same thing. But this reference to sureties may have been merely a point of

courtesy or of unnecessary caution, or perhaps only a civil excuse to Colonel Oldham for not giving the indulgence he asked. It is no more evidence that Langdon really misrepresented the effect of the deed to Captain Craster, than his acting at a later time without reference to the sureties would be evidence the other way. It ought to be treated as wholly insignificant.

Their Lordships have already mentioned their reasons for thinking it highly improbable that those who incurred the substantial liability of the whole debt would have scrupled at this particular clause. It has become important now, and Captain Craster may think that he would have treated it as of vital importance then, if all the consequences had been explained to him. But it has been before stated that he was a man who ought to have been, and probably was, able to look after his own affairs. He admits that the effect of the deed is plain to his understanding; only he did not take the trouble to read it. It would be a very dangerous thing to allow people who have induced others to advance money on the faith of their undertakings to escape from the plain effect of those undertakings on the plea that they did not understand them. It requires a clear case of misleading to succeed on such a plea. The District Judge seems to have acted on Captain Craster's statement alone. He does not mention the counter-statements of Oldham and Langdon. Taking Craster's statement, it hardly amounts to more than that Langdon underrated the risk he was running, and said that he was to be surety (which was the fact) without any particular mention of the last clause in the deed, which very likely was not mentioned. That would not suffice to shew that Langdon misled Craster. But, putting all the evidence together, their Lordships are satisfied that Craster was given to understand, perhaps even too broadly, that in his liability to the bank he stood upon an equal footing with Colonel Oldham and Mrs. Hodges.

The District Judge granted a decree against the Oldhams, and dismissed the suit as against Hodges and Craster with costs. The Court of the Judicial Commissioner gave a decree against all the defendants. This their Lordships hold to be

J. C.

1900

HODGES
v.
DELHI AND LONDON BANK.

right, though they differ as regards the grounds on which it should rest. The decree, however, is against all the defendants personally to pay the whole sum found due or accruing due. That does not recognise the representative position of Robert Hodges, who is only brought here as administrator of his mother's estate. In delivering judgment the learned Judicial Commissioner states that Mrs. Hodges was in the possession of her husband's estate, and remained the ostensible owner of the balance with consent of her sons, and that she was treated as the owner of the entire property by the defendant Hodges in his application for probate. He states a formal finding on the sixth issue thus: "I find that the defendant Hodges is liable to the extent of the entire estate in the possession of Mrs. Hodges." It does not appear that this record contains the requisite materials for trying such a question, which is more appropriate for a separate inquiry; and it is not disputed by the plaintiff's counsel that, as Hodges has not admitted assets, it would be more regular to ascertain the measure of his liability by inquiries in the execution of the decree. Their Lordships think that it would be right to add to the decree as follows: "But as regards the defendant Robert Nathaniel Hodges this decree is, except as regards the costs hereby ordered to be paid, made against him in his representative capacity. Let all proper inquiries be made and accounts taken for the purpose of ascertaining the amount of the estate of Katherine Hodges and the liability of the bank shares pledged by her and of her administrator Robert Nathaniel Hodges to make good the debt due to the plaintiff bank." Their Lordships will humbly advise Her Majesty to dismiss the appeal, and, with the qualification just mentioned, to affirm the decree. As regards the costs of the appeal, the case of Captain Craster has wholly failed, and the case of Robert Hodges has failed on the most material points. Their Lordships think that the modification now made ought not to affect the costs, especially considering that no attempt was made in the Court below to review the judgment on this point. The appellants must pay the costs.

Solicitors for appellants: *Young, Jackson, Beard & King.*

Solicitors for respondent: *Lyne & Holman.*

SURJAN SINGH AND OTHERS . . . . . PLAINTIFFS; J. C.*

1900

AND

June 22, 26; *July* 21.

SARDAR SINGH AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Indian Evidence Act, s. 32—*Admissibility of Evidence—Pedigree.*

Sect. 32 of the Indian Evidence Act, which makes statements in a pedigree relevant, only applies when the statements are made by persons who cannot be produced as witnesses. Accordingly, a pedigree is inadmissible in the absence of evidence to that effect.

APPEAL from a decree of the Judicial Commissioner's Court (May 15, 1897) reversing a decree of the Subordinate Judge of Kheri (Nov. 12, 1894).

The suit was brought by the appellants, under the circumstances stated in their Lordships' judgment, as next heirs of Munnu Singh, who died leaving a widow, who succeeded him, and a daughter who married the third defendant, and was the mother of two sons, who are the first and second defendants. On the death of the widow in 1881 the defendants were placed in possession of the village of Piparya Andu, which is the property in dispute, and mutation of names was made in their favour. In eleven years after her death the plaintiffs sued for the village, alleging that they were the next male heirs to Munnu. To make out this title it was necessary for them to establish, first, that by the custom of the family to which Munnu Singh belonged daughters' sons could not succeed; secondly, that they were the next reversionary heirs by male descent. Allegations to that effect were found in their favour by the original Court. The Judicial Commissioner reversed this decision, being of opinion that they had not made out their pedigree. He did not record any finding as to the alleged custom to exclude heirs by the female line.

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY DE VILLIERS.

J. C.

1900

SURJAN SINGH v. SARDAR SINGH.

The evidence by which the appellants sought to establish their title as reversionary heirs of Munnu Singh consisted of a pedigree of all branches of the family to which the parties belonged, prepared in manner as stated in the judgment. The custom that daughters' sons should be excluded was sought to be established by (1.) statements in village' wajib-ul-arzes; (2.) oral testimony.

The Subordinate Judge held that the plaintiffs, by producing the wajib-ul-arzes of various villages, had proved the custom excluding the sons of daughters, and that they had also established the pedigree upon which they relied. The genealogical table produced he treated as an original document which was admissible in evidence, and apparently conclusive.

The Judicial Commissioner found "that the family pedigree relied upon by the plaintiffs was inadmissible in evidence, inasmuch as the statements contained in it were not shewn to be the statements of the persons referred to in paragraph 1 of s. 32, Evidence Act. Neither Rajah Balbhadar Singh nor the bards who prepared it were examined by the plaintiffs."

And, after a review of the oral evidence of plaintiffs, he proceeded as follows:—

"We have, accordingly, only two witnesses, namely, Baldeo Singh and Gur Baksh Singh, who give the names of the lineal descendants of the three sons of Jugraj Sah, and thus shew the exact degree of relationship between the deceased Munnu Singh and the plaintiffs. But their evidence on this point is, in my opinion, of no value. Both are descendants of Rajah Pertab Singh by his first wife, and on their own shewing are distantly connected with the surviving descendants of Jugraj Singh's sons, the deceased Munnu Singh being according to them seventh in descent from the common ancestor, Rajah Pertab Singh.

"The information of the witness Baldeo Singh appears to be derived from a family pedigree which he says he has at home. That pedigree was not produced by him, nor was it summoned by the plaintiffs. The family pedigrees referred to by the witnesses Sheoamber Singh and Balbhadar Singh were also not produced by them.

"These family pedigrees would have been the best evidence in proof of plaintiffs' case, and their non-production justifies the presumption that if they exist they do not contain any entries in support of the plaintiffs' claim.

C. W. Arathoon, for the appellants, contended that this judgment erred in law in rejecting the pedigree as inadmissible in evidence. He referred to Indian Evidence Act, s. 32, and contended that the pedigree was an original document sufficiently proved by the oral evidence in the case, and corroborated by a wajib-ul-arz of Aurungabad dated October 26, 1894. He referred to *Bejai Bahadur Singh* v. *Bhupindar*. (1) As to the effect of the wajib-ul-arz, see *Uman Pershad* v. *Gandharp Singh*. (2)

Mayne, for the respondents, contended that the appellants had failed to make out their reversionary title, the pedigree not being proved by the witnesses, and therefore not being admissible under s. 32. As regards the wajib-ul-arz, even if admissible it did not prove the appellants' relationship to Munnu, on which their title depended.

Arathoon replied.

1900

July 21.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The appellants in this case sued for possession of the village of Piparya Andu, on the ground that on the death of Mussammat Gulab Kuar the property devolved on them as the reversionary heirs of her deceased husband Munnu Singh. He was the proprietor of the village, and the first summary settlement was made with him on the annexation of the Province of Oudh. After that he died, and the second summary settlement of the village after the Mutiny was made with Gulab Kuar. The judgment of the Assistant Commissioner, given on August 3, 1869, on a claim by her against the Government, stated that, Munnu Singh being hereditary proprietor held up to annexation, the summary settlement of 1857 was made with him, he died without leaving male

(1) (1895) L. R. 22 Ind. Ap. 139. (2) (1887) L. R. 14 Ind. Ap. 127.

J. C.

1900

SURJAN SINGH v. SARDAR SINGH.

issue, and the settlement was therefore made with his widow. And the Court decreed the proprietary right in the entire village in favour of Gulab Kuar, and also in favour of co-sharer. On January 7, 1881, Gulab Kuar made a will, by which she devised the village to her deceased daughter's three sons, Sardar Singh and Baldeo Singh, the respondents, and Bahadur Singh, who died before her. On July 8, 1881, she made a gift of some land in the village to Durga Singh, the other respondent, their father. Gulab Kuar died on July 12, 1881, whereupon, on August 10, 1881, an order for mutation of names of Munnu Singh was made in favour of Sardar Singh and Baldeo Singh and the other claimants, the appellants being referred to the Civil Court. Their suit was not instituted till November 30, 1892, more than eleven years after the dismissal of their claim.

The case stated in their plaint is that they and Munnu Singh are the descendants of Rajah Jugraj Sah by his second wife, that they are entitled to inherit the estate of Munnu Singh as his next heirs, that Gulab Kuar was in possession of the village only with the rights of a Hindu widow, and as such was not competent to alienate the property beyond her lifetime, that the will and deed of gift are consequently invalid, and that according to a well-established family custom daughters and their issue are excluded from inheritance. The respondents denied the alleged relationship of the plaintiffs with Munnu Singh and their reversionary title, and the existence of any custom by which daughters and their issue are excluded from inheritance. They alleged that the will and deed of gift were valid, as Gulab Kuar was in possession of the village and had the rights of an absolute proprietor, and that apart from the will Sardar Singh and Baldeo Singh, being sons of Munnu Singh's daughters, were entitled under the Hindu law to inherit his property on the death of his widow in preference to collateral heirs.

The Subordinate Judge who tried the suit found that the appellants' relationship to Munnu Singh and their reversionary title were proved, that Gulab Kuar's possession was only that of a Hindu widow, and that the will and deed of gift were

invalid, and made a decree in the plaintiffs' favour. The defendants appealed to the Court of the Judicial Commissioner of Oudh, which has decided only one of the questions that were raised, namely, whether the appellants are the reversionary heirs of Munnu Singh.

To prove this, the appellants produced a pedigree of the family of Rajah Pertab Singh, which shews that the plaintiffs are the collateral heirs of Munnu Singh. This pedigree was objected to as not being admissible in evidence. It was admitted by the appellants' counsel that it was prepared under the following circumstances, as deposed to by one of their witnesses. He was examined in 1894, and his evidence is that the pedigree was prepared in his family thirteen years ago. The bards were called to dictate it. It was prepared from the history given by them. It was copied from certain papers in the possession of the bards. In the year when the Rajah's marriage was settled in Surajpur, a dispute about it arose. Then they sent for the bards and got the pedigree prepared. The dispute was said to have been about the class of Thakurs to which the Rajah referred to belonged, and arose about the time of the death of Gulab Kuar. In their Lordships' opinion the Appellate Court has rightly held that the pedigree was not admissible, or, as the Indian Evidence Act says, relevant; s. 32 of the Act, which would make the statements in the pedigree relevant, only applies when the statements are made by a person who is dead or cannot be found, or has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable. Neither any of the bards nor Rajah Balbhadar Singh, who assembled the bards of the family and with their assistance had the pedigree drawn up, was called as a witness, and no proof was given that they were within any of these descriptions, which made it unnecessary to call them. A wajib-ul-arz of the village of Aurungabad, dated October 26, 1894, was relied upon for the appellants. It contained a statement purporting to have been made by Pitam Singh, deceased, but it is too vague to be of any value in proof of the appellants'

J. C.

1900

SURJAN SINGH v. SARDAR SINGH.

claim. The oral evidence produced by the plaintiffs was that of six witnesses, three of whom appear to have derived their information from family pedigrees which were not produced, and the others did not state the source of their information. The Appellate Court was of opinion that this evidence was not sufficient to prove the relationship with Munnu, in which view their Lordships agree. Apparently the Subordinate Judge who decided in the plaintiffs' favour was of this opinion, as in his judgment he says it was "shewn by the genealogical table," and did not rely upon other evidence. The pedigree not being admissible, the appellants failed to prove that they were the collateral heirs of Munnu Singh, and the Appellate Court, without giving any finding on the alleged custom to exclude daughters and their issue, set aside the decree of the lower Court and dismissed the suit. Their Lordships being of opinion that it was rightly dismissed, they will humbly advise Her Majesty to affirm that decree and to dismiss this appeal. The appellants will pay the costs.

Solicitors for appellants : *Barrow, Rogers & Nevill.*

Solicitors for respondents : *T. L. Wilson & Co.*

MOUNG THA HNYIN . . . . . DEFENDANT;

AND

MAH THEIN MYAH AND ANOTHER . . . PLAINTIFFS.

ON APPEAL FROM THE SPECIAL COURT OF LOWER BURMA AT RANGOON.

J. C.*

1900

June 28; *July* 21.

Partnership—Abardonment by a Partner of his Interest—Accounts—Disallowance of Manager's Charges where Accounts are not kept.

However precarious the subject-matter of a partnership may be, it is a matter of inference to be drawn from the facts of each case whether or not a partner has either abandoned his interest therein, or lost it by laches. Evidence that he declined to advance more money for partnership purposes, and left with occasional intervention the management to a co-partner, was held in the circumstances to be wholly insufficient to shew that he had lost his position.

Where a managing partner mixes up his private affairs with those of the partnership, and omits to keep clear accounts of any kind, the Court acts rightly in disallowing all disputed charges made by him even at the risk of disallowing to him expenses honestly incurred.

APPEAL from a decree of the Special Court of Lower Burma (April 26, 1899) affirming a decree of the judge at Moulmein (Sept. 7, 1898).

The Court, under the circumstances stated in the judgment of their Lordships, ordered the appellant to pay to Ko Moe, the respondents' predecessor, Rs. 50,835 4*a*. 3*p*., with interest at the rate of 12 per cent. per annum from March 30, 1896, the date of suit; and further appointed the appellant receiver of the unpaid portion of the debt due to the parties from the estate of Moung Shoay Hpaw, deceased.

Upon the issue whether the partnership was dissolved by mutual consent in or about March, 1887, there were concurrent findings of the lower Courts in the negative.

The judge at Moulmein said that this defence was practically abandoned, and that the appellant only alleged that he *considered* the partnership to be at an end by reason of the

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY DE VILLIERS.

J. C.

1900

MOUNG THA HNYIN v. MAH THEIN MYAH.

plaintiff's refusal to contribute funds on one occasion when asked to do so, and that there was not a word of evidence of any dissolution by mutual consent. The Special Court also found that was "no proof in the Court below of dissolution by mutual consent."

Accordingly, on June 1, 1896, the appellant, as the managing partner, was ordered to file his "accounts of the business of the partnership which stands dissolved from date of suit."

The Commissioner appointed to take the accounts disallowed all payments by the appellant which were neither supported by voucher nor stated in his account book to have been made on behalf of the partnership ; also the advances made to the agents, and the disbursements said to have been made by his agent, Moung Gale. His reasons were that the appellant did not keep proper or any partnership accounts, and was unable to state how much of the advances was made on account of the partnership. Moung Gale also kept no separate account for such partnership business as was entrusted to him. The appellant "very candidly admitted that he treated the partnership business as though it were his own private business, and therefore made no distinction in his accounts between the two businesses."

The judge adopted this report as the basis of his decree. The Special Court in Appeal said that "the Commissioner in taking the accoun proceeded in all respects regularly," and that it was "out of the question in taking accounts that items unsupported by a title of evidence should be allowed." It found on the appellant's evidence and that of his witnesses that he kept no separate accounts of the partnership, which, as managing partner, he should have done ; that there were presumably original materials which might have been produced by him but were not produced ; and that on the documents produced it was impossible to distinguish between partnership and private account.

Haldane, Q.C., and *J. W. M. Carthy*, for the appellant, contended that the partnership was dissolved by the refusal of Ko Moe to make further advances to the appellant on the

terms of the partnership agreement of October 20, 1885. Such refusal in the circumstances defeated the sole object of the partnership, and constituted a breach of the agreement which entitled the appellant to treat it has terminated. Ko Moe had, in fact, abandoned his interest in the concern, and had elected to put up with his loss rather than enter into the speculative transactions necessary to conduct it to a successful issue or to ensure any chance of so doing. By his laches and neglect to concern himself about the partnership venture, or to obtain accounts, and by his long delay, he had manifested an intention to abandon his interest, and could not be allowed, now that the appellant has secured the success of the enterprise, to reverse that intention and claim his share: see Lindley on Partnership, bk. 3, c. 10, s. 3, and 6th ed. p. 470; *Cowell* v. *Watts* (1); *Senhouse* v. *Christian*. (2)

It was also contended that the accounts had been taken on a wrong principle. Every item not supported by vouchers had been rejected. According to the common practice in Burma, sums are constantly paid without vouchers, and in the forest regular receipts would be unusual and impossible. The Courts should have endeavoured to ascertain what in the circumstances of the case would have been a reasonable sum to allow for the expenses of management, and have charged the same in the partnership accounts.

Cowell, for the respondents, was not heard.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The appellant in this case is the defendant below. The respondents are the representatives of the original plaintiff, who has died in the course of the suit. His death has not in any way varied the matters of dispute between the parties, who may for present purposes be conveniently styled plaintiff and defendant throughout.

On October 20, 1885, the plaintiff and defendant, who resided at Moulmein, made a written agreement to advance Rs. 1,10,000 for obtaining 4,445 logs of teak timber, which was

(1) (1850) 2 H. & T. 224.
(2) (1787) 19 Beav. 356, n.; 1 T. R. 560; 1 R. R. 300.

J. C.

1900

MOUNG THA HNYIN v. MAH THEIN MYAH.

therein stated to be lying in the Mhineloongyee forests and to have been hypothecated and delivered by the owner, Moung Shoay Hpaw, to the defendant as security for advances made by him. The parties were to advance the amount and to bear further expenses in the proportion of three shares to the plaintiff and two to the defendant, and the proceeds were to be shared in the same proportion. In the next year the partners advanced Rs. 30,000 more to the mortgagor in the same proportion. In point of fact the timber said to be delivered was in Siamese territory, at a great distance from Moulmein, and it had to be dragged to and launched upon the river Salween, down which it must travel some hundreds of miles before reaching Kado, where the loose logs could be captured for their consignees.

In August, 1886, the mortgagor of the timber died, and the defendant was declared his administrator in the following October. After that it was found that more money was wanted to recover the timber, and the partners provided Rs. 20,000 in the stated proportions. In March, 1887, the defendant required Rs. 10,000 more to meet expenses, and the plaintiff declined to pay the two-fifths demanded of him. The defendant alleged in his written statement that the partnership was then dissolved by mutual consent.

In 1896 the plaintiff brought this suit to take the accounts and to wind up the partnership. The preliminary question was whether it had been dissolved in March, 1887; and a separate issue was framed by the judge of Moulmein to try that question. The plaintiff denied that there was any dissolution, or any abandonment by him of his interest in the concern, and said that he did not advance the money demanded because the defendant would not render any account of his dealings with the last advance. The defendant said that on the plaintiff's refusal he considered the partnership to be at an end; that the plaintiff gave no reason for refusal; that he, the defendant, made no further demand, and gave no notice to the plaintiff that the partnership was dissolved. Upon this evidence the judge of Moulmein found that there had been no dissolution by consent; and on June 1, 1896, he passed an

order which declared that the partnership was dissolved as from that date, and ordered the defendant as managing partner to file accounts.

The defendant raised the same question again after the accounts were taken, both in the First Court and on appeal in the Special Court of Lower Burma. But he raised it in a different shape; not alleging mutual consent, but relying on the laches of the plaintiff and his abandonment of the undertaking. There was, however, no more evidence of express abandonment than of consent, and there was some evidence of the plaintiff's subsequent intervention in the partnership affairs. So the defendant had nothing to support his plea except the fact that the plaintiff had declined to advance money in March, 1887, and had left the management of the business to the defendant, who filled three characters. He was mortgagee prior to the partnership, he was legal representative of the mortgagor, and he was managing partner.

The Special Court held that they could not infer abandonment, and they maintained the judgment of the First Court on what they call this much-laboured and unsubstantial point. It has been laboured again with all the resources of able advocacy at this bar; but their Lordships have not been induced to doubt the soundness of the view taken by the Courts below. It is not necessary to enter again on an examination of the well-known class of cases exemplified by *Norway* v. *Rowe*. (1) Even assuming in the defendant's favour that the subject-matter of this partnership is as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case, whether or no there has been abandonment, or loss of interest by laches. And there is no case, or, at least, none cited, in which the Court has held a partner to have lost his position on grounds so slender as those which exist here.

On coming to take the accounts great difficulties were found. Besides the various characters filled by the defendant, another element of confusion appeared. He had dealings in timber peculiar to himself in the same quarter as the partnership dealings, and on a larger scale. His agent in the timber

(1) (1812) 19 Ves. 144; 12 R. R. 157.

J. C.

1900

MOUNG THA HNYIN v. MAH THEIN MYAH.

district was his brother Moung Galay, who had indubitably expended large sums of money, but on what account it was impossible to say. The defendant says:—

"I instructed my clerk to make an abstract of all my payments to Moung Galay, no matter on what account. I cannot distinguish the account on which the money was spent without Moung Galay's accounts. He never specified in his demands the purpose for which he wanted the money, nor rendered accounts of his expenditure, although I asked for them. I did not discharge him, because he was my brother, and I knew he would not cheat me. I carried on the partnership as though it were my own business; and kept no separate account for it."

Moung Galay is dead, and no accounts are produced as coming direct from him. Perhaps if there were any they would not make matters any clearer, for the defendant tells us again:—

"I made payments to Moung Galay for my own business, besides those for the partnership. Moung Galay never rendered accounts since Wahzo, 1252. The account I have filed (abstract 4) was made up from an account furnished by Moung Galay, and returned to him. In his account the expenditure on each business was not shewn separately, but Moung Hpo Tsin and he went through the accounts and ascertained what had been spent on each business."

The Burmese year 1252 may be gathered from the documents to cover parts of the Christian years 1890, 1891.

The clerk, Moung Hpo Tsin, was examined, and tells us: "I wrote accounts marked 'copy of Moung Galay's accounts A and B.' Some of the entries were taken from Moung Galay's accounts, and some from defendant's cash-books." Further, he relates in cross-examination how Moung Galay brought an account-book; how he and the clerk picked out items which the clerk copied into a book; how the account so prepared was taken to Mr. Thompson, who was advising the plaintiff with reference to settlement of the partnership affairs; and how Mr. Thompson rejected the account as confused. "The accounts now produced as copies of Moung Galay's accounts

were written to make matters clear for the purposes of the dispute between plaintiff and defendant." Further, he says that Moung Galay "did some timber business for defendant at Maihan. He also looked after defendant's business with Pah Taw and Pan Nyo, and others. About two lakhs were sent up altogether to Moung Galay. In his demands he never specified the account for which the money was required. From 1252, when Moung Galay went up the second time, it is impossible to distinguish the expenditure on the partnership business from the expenditure on other accounts."

From these statements it results that the accounts now put in are not those kept by the defendant, nor those kept by Moung Galay. They are a hash of some books or papers belonging to Moung Galay, and of others belonging to the defendant, and of verbal statements by Moung Galay, put together for submission to Mr. Thompson, and rejected by him as confused, and a re-hash of the same with some subsequent items for the purposes of the suit. They are doubtless tendered in good faith, for no attempt is made by the defendant to conceal their deficiencies or to claim for them more authenticity than they possess.

The accounts were referred to a Commissioner, Mr. Bayly, whose report, made in November, 1897, shews that he went into the matter with much care. There was little difficulty on the receipt side. On the other side, owing to the lack of accounts, and to the confusion between the defendant's private business and his executorship business and the partnership business, the Commissioner found himself compelled to disallow nearly all of the claims disputed by the plaintiff. He expressed an opinion that the defendant was entitled to some reasonable allowance for the services of his agents and for the expenses of getting the timber and of litigation connected with it, and for interest on money advanced by him: but he thought he had no authority to decide such matters, and so he referred them to the Court. Subject to the Court's decision, he found the plaintiff entitled to Rs. 50,835 1*a.* 5*p.* as his two-fifths share of the money received by the defendant for which he has not accounted.

J. C.

1900

MOUNG THA HNYIN
v.
MAH THEIN MYAH.

On receipt of this report the judge of Moulmein overruled some objections taken by the defendant, among which were objections founded on the plaintiff's laches; but as to the Commissioner's recommendations, the learned judge could not discover any more materials for guidance than were in the hands of the Commissioner. He found the plaintiff entitled to Rs. 50,835 1*a*. 5*p*., and then sent the case back to the Commissioner for the purpose of ascertaining the value of the assets in items 9 and 10 of "Statement 3. Assets of the partnership"; and also to ascertain from the parties what allowance they agree (as there is no evidence, and it is only by mutual agreement any allowance can be made) should be made for the services of the agents employed for the partnership business and for the expenses they (the agents) defrayed in "ounging" out the timber belonging to the estate of the deceased debtor, and in connection with the litigation in which the estate was involved; also the value of a set-off claimed by plaintiff.

This further reference came to nothing, because the parties could not agree. In reporting that result to the Court the Commissioner added: "It is possible, I consider, for defendant to give if he chooses full details of his own private work that was carried on by the partnership agents so as to enable me to allow a proper proportion of remuneration for the services of the agents in the partnership business; but he has not done this, although he has had ample opportunity both before me and the Court to do so, nor has he furnished such particulars of the ounging work, including the employment of the partnership elephants, as would also enable me to ascertain the cost of ounging the partnership timber."

After some further discussions and evidence, and after making an arrangement about the lawsuit in Siam, the case was brought again before the judge of Moulmein, who delivered a detailed judgment explaining why he could not vary the prior conclusions. He made a final decree in favour of the plaintiff for Rs. 50,835 4*a*. 5*p*. with interest and costs.

On appeal the Special Court took the same view, confirming the judgment on the same grounds as were indicated by the

Commissioner and by the two successive judges of Moulmein. Their Lordships have nothing to do now except to say that the appellant's counsel have wholly failed to persuade them that a Court of Justice can properly arrive at any conclusion more favourable to the appellant. If it be true, as is earnestly alleged on his behalf, that expenses honestly incurred for the partnership have been disallowed to him, the answer is that by his own acts in mixing up his private affairs with those of the partnership, and his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellant must pay the costs.

J. C.
1900
MOUNG THA HNYIN v. MAH THEIN MYAH.

Solicitors for appellant : *A. H. Arnould & Son.*

Solicitors for respondents : *Richardson & Co.*

RAJAH KOTAGIRI VENKATA SUBBAMMA RAO . . . . . } PLAINTIFF ;

AND

RAJAH VELLANKI VENKATRAMA RAO . . . . . } DEFENDANT.

J. C.*
1899
Nov. 9.
1900
June 28.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Compromise after Decree—Amendment of Decree ultra vires—Civil Procedure Code, ss. 206, 623—*Limitation in Execution Proceedings.*

After two of the defendants to an ejectment decree had applied to the High Court for leave to appeal, one of them compromised with the plaintiff, and the High Court thereupon amended its decree in terms of the compromise :—

Held, that this amendment was not authorized by either s. 206 or s. 623 of the Civil Procedure Code, and was ultra vires and inoperative. The proper course to adopt was to make the compromise a rule of Court, and

---

**Present* : THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C.

1900

RAJAH KOTAGIRI VENKATA SUBBAMMA RAO
v.
RAJAH VELLANKI VENKATRAMA RAO.

stay all proceedings under the decree against the defendant party thereto, except for the purpose of enforcing the compromise against him :

Held also, on a petition for execution of the decree, that the limitation period ran from the date of the first and not the amended decree of the High Court, and was barred as against the respondent, who was no party to the compromise.

APPEAL from a decree of the High Court (Dec. 1, 1896) setting aside both a decree of Parker J. (Aug. 20, 1895) and also an order of the Subordinate Judge of Ellore (March 31, 1894).

The proceedings out of which the appeal to Her Majesty arose were brought in execution of an original decree dated October 17, 1884, of the District Court of Kistna, which established the right of the plaintiff to certain landed estates forming a part of the Magadapa estate. This decision was affirmed by the High Court, but the decree of the latter Court was remodelled in order to carry out a subsequent compromise between the representative of the plaintiff and the third defendant. The questions raised by the appeal were whether the representative of the original plaintiff could execute the amended decree against the first defendant, and whether the right to do so is barred by limitation.

The last male holder of the estate was Sudarsuna Rao. He died childless, and was succeeded by his mother, Chellayama, who died in 1872. He was descended from Gopal Rao, who had three sons, Joga Rao, in whom the property in suit had vested, Pedda Rama Rao, and Venkata Rao. The first of these three lines of descent became extinct on the death of Chellayama. The line of Pedda Rama Rao was represented by the defendants. The line of Venkata Rao was represented by the plaintiff, who was the natural son of the first defendant.

The plaintiff obtained a decree in ejectment. There were four defendants. The first and fourth admitted the plaintiff's title. The second and third disputed it. The decree was against the first, second, and third defendants jointly and severally. With regard to the fourth, he defended as adopted son to a deceased heir whose widow was second defendant. If his adoption was valid, he was the true heir ; if invalid, the second defendant, the widow, represented the deceased, and

the decree directed that on establishing his adoption he should be liable to the decree. An appeal from this decree was dismissed by the High Court on July 12, 1886. In the next month the plaintiff died, and was succeeded by his widow Buchamma. In September the second and third defendants applied for leave to appeal to Her Majesty. On November 23, 1887, Buchamma and the third defendant presented the Razinamah set out in their Lordships' judgment, which was followed by the order of the High Court dated February 1, 1888, set out in their Lordships' judgment, and dismissing the application for leave to appeal.

The decree was not actually amended till March 3, 1891, and then it was dated July 1st, 1886. Meanwhile on January 28, 1891, Buchamma filed an application for execution of the decree as amended on February 1, 1888, by putting her in possession of two-thirds of the estate and the mesne profits, and other relief granted by the decree. All four original defendants were made parties to this petition.

This petition was opposed by all but the second defendant. The first and fourth objected that no execution could be taken out against them as they had been exonerated by the original decree, and that the application was barred by limitation. The third defendant argued that, as the decree had been amended according to the Razinamah, "the petition presented by this plaintiff including the third defendant also is not maintainable."

On October 3, 1891, the Sub-Judge rejected the application for execution. He said that the original decree was barred by limitation and that there was no amended decree. This decision was set aside by the High Court on September 4, 1893. The Sub-Judge was informed that the appeal decree had been amended on March 3, 1891, and that the copy was in possession of the District Judge.

On March 31, 1894, the Sub-Judge granted execution as prayed. As to limitation, he said "the time from which the period of three years begins to run under clause 2 of art. 179 in this case is the date of the final decree or order of the Appellate Court, and such date here is February 1, 1888.

J. C.

1900

RAJAH KOTAGIRI VENKATA SUBBAMMA RAO v. RAJAH VELLANKI VENKATRAMA RAO.

On August 20, 1895, Parker J. affirmed this order. He said :—

"The test in such a case is whether the whole decree is imperilled by the appeal of one, and, if it is, the limitation will run against all under art. 179 of the Limitation Act from the date of the appeal judgment (Ind. L. R. 12 Mad. 479; 16 Calc. 598; 19 Calc. 750). In the present case the decree was in peril until the motion for liberty to appeal to the Privy Council was withdrawn on February 1, 1888. The present application was presented within three years from that date and is in time."

Against this decision an appeal was preferred by the representative of the first defendant under s. 15 of the letters patent; and on December 1, 1896, the High Court reversed the order appealed against, and dismissed the execution petition as against first defendant on the ground that he was no party to the execution decree, that no relief was given against him, and that there was nothing in the decree which could be executed against him.

On February 2, 1897, Subbamma presented a fresh petition to the High Court praying that their decree should be amended so as to bring it into conformity with the meaning of the parties and of the Court; but this application was rejected on August 9, 1897.

Mayne, for the appellant, contended that the orders of the High Court dated December 1, 1896, and August 9, 1897, should be reversed and the order of Parker J. should be restored. He contended that the decree of the High Court of July 12, 1886, reserved to the plaintiff all her rights under the original decree, and that the effect of the amended decree was only to alter them by consent for the benefit of the third defendant. The amended decree was not intended and did not in its true effect destroy the plaintiff's right against all the defendants except the one who agreed to it. The High Court had no power to affect the rights conferred by its decree except so far as the parties consented thereto. Subject to the alterations introduced by consent, the amended decree reaffirmed the

original decree, and the High Court ought to have held that the amended decree was enforceable against all the defendants. The amendment was as to one-third of the estate; the decree as to two-thirds remained in full force. See s. 206 of the Civil Procedure Code and art. 79 of Act XV of 1877. The period of limitation ran from the date of the first decree of the High Court until it was amended. After amendment it ran from the date of the amended decree, which was the final one between the parties. Until that was amended the appeal to Her Majesty was pending and finality was in abeyance. The decree of the original Court against the first defendant was a consent decree. The amendment confirmed it, and it was contended that the decree remained enforceable against him.

Branson, for the respondent, contended that the application for execution of decree filed on January 28, 1891, was barred by limitation. No stay of execution had been granted either of the original decree, dated October 17, 1884, or of the High Court decree dated July 12, 1886. The plaintiff, therefore, could at any time have applied for execution, notwithstanding the application of the second and third defendants for leave to appeal to Her Majesty. That application did not prevent the enforcement of the decrees. Nor did its dismissal give the plaintiff a new starting-point. The first defendant was no party to the amended decree, and the amendment could not affect his rights directly or indirectly, even if it were operative at all. The only decree which affected the first defendant was that of July 12, 1886, and execution of that was barred by limitation. The first application for execution was made on January 28, 1891. There had been no application by the defendants or either of them for stay of execution. Nothing had happened except an application, afterwards compromised, for leave to appeal to Her Majesty, and some attempts to amend the decree in the interests of one defendant to the exclusion or behind the backs of the others. It was contended that this was inoperative to give a fresh starting-point under the Act.

Mayne replied.

J. C.

1900

RAJAH KOTAGIRI VENKATA SUBBAMMA RAO *v.* RAJAH VELLANKI VENKAT-RAMA RAO.

1900, June 28. The judgment of their Lordships was delivered by

LORD DAVEY. The delivery of the judgment on this appeal has been delayed at the request of the respondent's solicitors. In the first instance the respondent's counsel desired to draw their Lordships' attention to certain articles of the Code of Procedure which had not been mentioned at the hearing of the appeal, and subsequently a petition was lodged for leave to produce fresh evidence, which was disposed of yesterday morning.

The facts which have given rise to the present appeal are shortly as follows. A suit was brought to recover the estate of one Sudarsuna Rao, the succession to which opened on the death of his mother in 1872. There were four defendants. The second and fourth defendants were the widow and (alleged) adopted son of one Suryaprakasa Rao, deceased, and between them represented one interest. The first and fourth defendants by their written statements admitted the plaintiff's case. The third defendant and second defendant contested it. But the interest of the second defendant depended on the alleged adoption of the fourth defendant by Suryaprakasa Rao turning out to be invalid. The respondent is the representative of the first defendant, now deceased. That defendant was the natural father of the original plaintiff, which to a certain extent may serve to explain the delay in executing the decree against him.

The District Judge decided in favour of the plaintiff, and by his decree, dated October 17, 1884, it was ordered that the plaintiff's claim be allowed with mesne profits, and that the costs of plaintiff and defendants one and four be paid by defendants two and three; that the fourth defendant be personally exonerated, but, should he succeed in establishing his adoption and get possession of the property of the second defendant, then such property be liable to this decree, and that, subject to this limitation, first, second, and third defendants be severally and jointly liable to this decree.

The second and third defendants appealed to the High Court,

with the result that on July 12, 1886, that Court confirmed the decree of the original Court, and dismissed the appeal with costs.

The plaintiff died on August 18, 1886, and his widow Buchamma was substituted on the record as his legal representative. Buchamma subsequently died, and her infant daughter Subbamma (the present appellant) was brought on the record in her place.

In September, 1886, the second and third defendants applied to the High Court for leave to appeal to Her Majesty in Council against the decree of the High Court. Pending the proceedings on this application, Buchamma and the third defendant compromised the suit as between themselves. And on November 23, 1887, they presented to the High Court a Razinama petition in the following terms :—

" The respondent's widow Rajah Vellanki Buchamma Rao Zamindar Garu begs to submit as follows :—

"As the appellant has presented a petition praying for permission to appeal to the Privy Council, and as I am a female and not sufficiently wealthy to defend the suit, I have agreed to the effect that I should receive from the appellant Rs. 9,000 (nine thousand) now paid, exclusive of Rs. 1,000 (one thousand) already paid on account of costs, &c., as proper consideration, that the appellant should be in enjoyment of one-third share in the Zamin of the northern portion of Vinigadapa estate in suit, one-third share in the houses and the Devastanam Dharmakartaship as usual, and that I should give up my claim against the appellant.

" The appellant submits as follows :—

" As I have agreed to the terms stated above by the respondent widow, I most respectfully pray that the petition put in by me praying for permission to appeal to the Privy Council may be dismissed, that this Razinama petition may be filed with the records of your Court, and that the decree may be amended on the terms hereof."

On February 1, 1888, the High Court made the following order on this petition :—

" We make the razee set out in civil miscellaneous petition

J. C.

1900

RAJAH KOTAGIRI VENKATA SUBBAMMA RAO *v.* RAJAH VELLANKI VENKATRAMA RAO.

No. 71 of 1888 a rule of Court, and accordingly direct that the decree in appeal No. 40 of 1885, dated the 12th day of July, 1886, be amended by omitting the words, 'This Court doth order and decree that the decree of the Lower Court be, and the same hereby is, confirmed, and this appeal dismissed; and this Court doth further order and decree that the apellants do pay to the respondent Rs. 270-8-5 for his costs in opposing this appeal,' and by substituting therefor the words, 'It appearing that Rs. 9,000, exclusive of Rs. 1,000 already paid on account of costs, has been paid to the respondent as proper consideration, this Court doth order and decree that the appellant do enjoy one-third share in the Zamin of Magadapa estate in suit, one-third share in the houses and the Devastanam Dharmakartaship as usual, and that the respondent's representative do give up her claim against the 2nd appellant.'"

The application for leave to appeal to Her Majesty in Council was thereupon dismissed.

The actual amendment of the decree in pursuance of this order was not made until March 3, 1891. As amended the decree bore date July 12, 1886 (the day on which the order was made dismissing the appeal to the High Court), and was in the following terms :—

"*Decree.*—This appeal coming on for hearing on Monday, the 22nd day of March, 1886, and having stood over for consideration till this day; upon perusing the grounds of appeal, the judgment and decree of the Lower Court, and the material papers in the suit, and upon hearing the arguments of Mr. R. Sadagopachariyar, vakil for the appellants, and of Mr. J. H. S. Branson, counsel for the respondent; it appearing that Rs. 9,000, exclusive of Rs. 1,000 already paid on account of costs, has been paid by the respondent as proper consideration, this Court doth order and decree that the 2nd appellant do enjoy one-third share in the Zamin of the northern portion of Inagadapa estate in suit, one-third share in the houses and the Devastanam Dharmakartaship as usual, and that the respondent's representative do give up her claim against the 2nd appellant."

It is not easy to understand what jurisdiction the High Court supposed themselves to have to amend their decree in this

manner. So far as their Lordships are aware, the High Court has no power to alter its own decrees except under the provisions of either s. 206 or s. 623 of the Civil Procedure Code, and neither of these sections authorizes such an amendment as was made by the Court. Sect. 206 enables the Court to amend the decree if it is found to be at variance with the judgment, or if any clerical or arithmetical error be found in it. Sect. 623 enables any of the parties to apply for a review of any decree on the discovery of new and important matter and evidence, which was not within his knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. It is not necessary to decide in this case whether the latter words should be confined to reasons strictly ejusdem generis with those enumerated, as was held in *Roy Meghraj* v. *Beejoy Gobind Burral.* (1) In the opinion of their Lordships, the ground of amendment must at any rate be something which existed at the date of the decree, and the section does not authorize the review of a decree which was right when it was made on the ground of the happening of some subsequent event. It is, however, easy to point out the inaccuracies of the decree as amended. It does not dispose of the appeal of the second defendant, who was also appellant, and it states circumstances as appearing to the Court on July 12, 1886, which were not at that date existent. A plausible explanation of the extraordinary order made by the High Court is that it was really based on an agreement between all the parties to the litigation, including the first, second, and fourth defendants, as well as the third defendant who made the compromise, to which effect was given by the order. But no such agreement was proved or even suggested at any stage of the proceedings which followed the amendment of the decree, and neither the order of February 1, 1888, nor the amended decree is expressed to be made by the consent of any party other than the third defendant; nothing of the kind is to be found in the record or proceedings before their Lordships, nor was any suggestion of the kind made at the hearing of the appeal. It

(1) (1875) Ind. L. R. 1 Calc. 197.

J. C.

1900

RAJAH KOTAGIRI VENKATA SUBBAMMA RAO *v.* RAJAH VELLANKI VENKAT-RAMA RAO.

is too late now for their Lordships to listen to any suggestion of such an agreement even if it could regularly be put in evidence in the execution proceedings, and the case must be dealt with on the footing that no such agreement existed.

Buchamma on August 4, 1891, petitioned the High Court to further amend the decree so as to establish the compromise without disturbing the rest of it. This application was refused, on the ground that the amendment was made in accordance with the compromise, and in terms of that compromise. Their Lordships are unable to agree with the view so expressed. The petition asked only that the Razinama might be placed on the files of the Court, and the decree amended accordingly, i.e., so as to give effect to the compromise between the appellant and the third defendant only. It was no doubt erroneous in asking for any amendment of the decree, and the only order which should have been made on it was to make the Razinama a rule of Court, and stay all further proceedings on the decree against the third defendant except for the purpose of enforcing the compromise.

In the meantime and on January 28, 1891, Buchamma filed an application for execution of the original decree of October 17, 1884. In the column headed "Whether any appeal was preferred against the decree," it is mentioned that an appeal was preferred and the decree of the Lower Court was confirmed, "thereupon application for review having been made, review order was passed on February 1, 1888." The petition sought possession of two-thirds of the estate with mesne profits. All four original defendants or their representatives were made parties to the application. The present respondent claimed that the application was barred by limitation. The third defendant relied on the compromise. And the fourth defendant, in addition to the defence of limitation, averred that he was not a party to the "review order" mentioned by plaintiffs, and it did not affect him. The second defendant offered on opposition.

This application has come before the Courts no less than five times, and various judicial opinions have been expressed. When the case first came before the District Judge he had not

before him the amended decree, and he held that the application was barred by limitation, three years having elapsed since the date of the appeal decree in 1886. On appeal the amended decree was produced and the case was remanded. On coming again before the District Judge he held that the time for limitation ran from the date of the order of February 1, 1888; and decreed execution for two-thirds of the estates and mesne profits. On appeal to a single judge, Parker J. concurred and dismissed the appeal. The learned judge seemed, however, to have thought that the application for leave to appeal to Her Majesty in Council stayed proceedings on the decree, which is clearly erroneous. On a second appeal by the present respondent to the High Court, on the ground that the amended decree grants no relief against the first defendant, the Court set aside the order of Parker J. and dismissed the execution petition. There was in fact (they held) nothing in the decree that can be executed against the defendant.

There is now an appeal to this Board. Their Lordships have had great difficulty in unravelling the tangled skein of these proceedings. The whole difficulty has been occasioned by the terms in which the order of February 1, 1888, and the amended decree were drawn up. Mr. Mayne argued that there was no final decree or order until that order was made, and consequently limitation only then began to run against his client. He is at once met with the difficulty that the amended decree which he seeks to have executed gives no relief against the respondent. It is difficult, looking to the terms of the amended decree, to accept his suggestion that the two together form the final decree. The amended decree clearly is intended by its terms to be a sustitution for the whole of the appeal decree. But, in truth, the appeal decree of 1886 required nothing to complete it, and when closely examined Mr. Mayne's argument rests on the erroneous assumption that the application for leave to appeal to Her Majesty in Council by the second and third defendants operated as a stay of execution against the other defendants, and required to be got rid of to make the appeal decree complete or operative. In fact, he treats the application for leave as equivalent to an appeal.

J. C.

1900

RAJAH KOTAGIRI VENKATA SUBBAMMA RAO *v.* RAJAH VELLANKI VENKATRAMA RAO.

Their Lordships have come to the conclusion that the order of February 1, 1888, so far as it directed an amendment of the decree, was *ultra vires* and had no operation either in favour of or against the defendants, who were not parties to that application. Or, in other words, they must regard it as an order made only for the purpose of giving effect to the compromise, and not as adding to the decree, but as pro tanto satisfaction of it. The original decree (as confirmed on appeal) therefore remained in force against the other defendants, and might have been executed against them; and, on the other hand, they are entitled to the benefit of limitation as from the date of the appeal decree.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed. They would gladly relieve the appellant from the costs, as the whole difficulty has been occasioned by the form in which the order of February 1, 1888, was drawn up by the officers of the High Court. But, on the most favourable view to the appellant, she and her predecessors have remained idle and not enforced their decree while the period of limitation has been running, and their Lordships cannot deprive the respondent, who they hold is right, of his costs. The appellant will pay the costs of the appeal, but may set off the costs of the respondent's petition for the admission of fresh evidence.

Solicitor for appellant : *R. T. Tasker.*

Solicitors for respondent : *Barton, Yeates & Hart.*

RAJA BHUP INDAR BAHADUR SINGH . APPELLANT; J. C.*

AND

1900

BIJAI BAHADUR SINGH . . . . . RESPONDENT. *July* 10, 21.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Mesne Profits—Code of Civil Procedure, s. 211—*Final Order in the Execution Department—Appealable Order—Code of Civil Procedure, ss.* 2, 540, 588.

A decree in ejectment, dated November 12, 1887, declared the plaintiff entitled to future mesne profits, and was eventually affirmed by the Queen in Council on May 11, 1895 :—

Held, that mesne profits were recoverable up to May 11, 1895, and (see s. 211, C. P. C.) for a further period not exceeding three years until recovery of possession.

An order of the District Court in execution proceedings limiting the recovery of mesne profits to three years from November 12, 1887, is in the nature of a final decree as defined by s. 2 of the Civil Procecure Code, and is appealable under s. 540.

APPEAL from a decree of the High Court (Feb. 11, 1897) reversing an order of the judge of Mirzapur (July 22, 1896).

By that order the District Judge decided that under a decree dated November 12, 1887, the respondent should be awarded mesne profits from the date of the decree up to November 12, 1890, that is for a period of three years. The High Court heid that the decree-holder, the respondent, was entiiled to mesne profits up to November 30, 1895.

The questions in the appeal relaied to the effect of an Order in Council dated May 11, 1895, and the construction of s. 211 of the Code of Civil Procedure (Act XIV. of 1882).

The final decree of ejectment in the case was the order of May 11, 1895, and possession was obtained by the respondent on November 30, 1895.

On March 16, 1896, he petitioned the District Judge in the Execution Department, alleging that mesne profits were due from date of suit till recovery of possession. The appellant objected that he was not entitled to any further mesne profits under his

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

J. C.

1900

RAJA BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH.

decree, meaning the order of May 11, 1895. This was overruled, and an issue (being the second on the record) framed for what period are mesne profits recoverable.

On this issue the District Judge said that his decision depended on the interpretation of ss. 211 and 244 of the Civil Procedure Code. He ruled that the case before him came "within the condition of s. 211," and that the question in dispute, in so far as it related to mesne profits which the decree had made payable after the expiration of the term of three years from the date of the decree, should not be decided in execution but by separate suit. In the result, he ordered that, according to the decree dated November 12, 1887, the mesne profits for only three years, that is, from the date of the aforesaid decree up to November 12, 1890, should be awarded to the decree-holder.

Before the High Court a preliminary objection was taken by the judgment-debtor that no appeal lay, inasmuch as the matter which was the subject of the appeal was not a final order but only an interlocutory one. This was for these reasons overruled: "The question is not at all free from difficulty. Very able arguments on both sides have been addressed to us, and we have been forced into the present decision by the presence on the record of a formal order in which the judge of Mirzapur has embodied his finding on the second of the two issues before him. We do not at all determine to-day the general question as to whether such a decision standing by itself and unaccompanied by a formal order would be appealable. The order stands on the record, and there is no gain saying the fact that it practically dismisses the claim of the decree-holder for some five or six years' profits. That matter has been determined by the Court in a way that it never can go back again."

Thereafter the High Court set aside the order appealed from, and directed the judge to determine the mesne profits in manner as prayed by the decree-holder. Their judgment was to the effect (1) that the only operative decree which could be executed was the order of Her Majesty in Council, dated May 11, 1895; (2) that the proper interpretation to put on a decree for mesne

profits is that it is a decree for mesne profits up to date of possession : see *Fakharuddin Mahomed Ahsan Chowdhry* v. *Official Trustee of Bengal* (1) ; (3) that s. 211 of the Civil Procedure Code governed the case, and that, assuming the above order in Council was the decree to be enforced, that section empowered the Court to give a decree for mesne profits from September 23, 1886, the date of suit, up to May 11, 1895, the date of the Order in Council, and thereafter up to November 30, 1895, the date of the decree-holder taking possession.

Ross, for the appellant, the judgment-debtor, contended that this judgment was erroneous. The order of July 22, 1896, was not an appealable order under the Code. It is not included in the orders enumerated in s. 588. It is an interlocutory, and not a final order. Reference was made to *Puran Chand* v. *Roy Radha Kishen* (2) ; *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose* (3) ; *Girischunder Lahiri* v. *Shikhareswar Roy* (4). It was further contended that the order of May 11, 1895, and s. 211 of the Code had been wrongly interpreted, and that the respondent was only entitled to recover in the execution proceedings mesne profits for three years—that is, from November 12, 1887, to November 12, 1890. For any further mesne profits the respondent's only remedy according to the Code of Civil Procedure was by a fresh suit.

Raikes, for the respondent, was not heard.

The judgment of their Lordships was delivered by

1900
July 21.

LORD HOBHOUSE. This appeal is presented against an order made in the course of execution proceedings. The plaintiff in the suit, who was the original respondent in the appeal, claimed possession of land. On November 12, 1887, the District Judge passed a decree in his favour, ordering possession, and adding, "the plaintiff is also entitled to future mesne profits." The defendant, now appellant, appealed to the High Court, who, on July 19, 1889, reversed the decree

(1) (1881) L. R. 8 Ind. Ap. 197.
(2) (1891) Ind. L. R. 19 Cal. 132.
(3) (1886) Ind. L. R. 14 Cal. 53.
(4) See ante, p. 110.

J. C.

1900

BAJA BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH.

and dismissed the suit. The plaintiff then appealed to the Queen in Council, who, on May 11, 1895, ordered that the decree of the High Court should be reversed and the District Judge's decree of November 12 be affirmed.

After that the plaintiff prosecuted his claims in execution of the decree so affirmed by the Queen in Council. He recovered possession on November 30, 1895. Then he proceeded to recover mesne profits. He claimed them from September 23, 1886, on which day his suit was brought, down to the recovery of possession by him. The defendant objected that no decree remained to be executed except that of the Queen in Council, which made no mention of mesne profits; but the District Judge held that the Queen's order had come down for execution, and "its effect causes reference to be made to the original decree of this Court as a final decree in all applications for execution."

Having thus settled that the Queen's order gave mesne profits by reference to the original decree, the District Judge went on to frame issues. The second of such issues was, "For what period are mesne profits recoverable?" It was arranged that this issue should be treated as preliminary to taking accounts, and should be argued separately. That was done, and the District Judge decided that mesne profits were due for the three years next after the date of the original decree, i.e., from November 12, 1887, to November 12, 1890.

From this decree the plaintiff appealed to the High Court, who, in the first instance, addressed themselves to a preliminary objection made by the defendant that no appeal is given by the Procedure Code in such a matter. The High Court overruled that objection. As it has been renewed here, and earnestly pressed upon their Lordships by Mr. Ross, it may be convenient to dispose of it in the first instance.

The High Court felt considerable difficulty on the point. They allowed the appeal on the ground that the District Judge had tried the question separately, and had embodied his finding in a formal order. They remark that it practically dismisses the claim of the decree-holder for some five or six years' profits, and that in a way which, in the Court of the

District Judge, is final. Therefore they hold it be an appealable order.

Treating the question as if it were whether the order under consideration is final or interlocutory in its nature, and testing it by the ordinary principles applicable to such questions, their Lordships think, not only that the High Court are right in the particular circumstances of the case, but that there is not any need to rely upon the accident that the District Judge took the convenient course of trying the liability to account in a separate issue and deciding it in a separate judgment. His decision is a final one in its essence, and would be so equally whether it stood alone or was combined with decisions on other points. It resembles in principle a decree for account made at the hearing of a cause, which is final against the party denying liability to account, and is appealable, though it is also in another way interlocutory and may result in the exoneration of the accounting party, or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect, and as such equally open to appeal.

But then Mr. Ross urges that we are not testing the question by general principles, but by the expressions of the Code which relate to appeals. That is true, and their Lordships turn to the Code to see what it says.

Sect. 540 gives a right to appeal to the proper Court from the decrees or from any part of the decrees of Courts exercising original jurisdiction. By s. 2 a decree is thus defined: "The formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication so far as regards the Court expressing it decides the suit. . . . An order . . . . determining any question mentioned or referred to in s. 244, but not specified in s. 588, is within this definition." Sect. 244 is that which gives to the Court engaged in executing a decree jurisdiction to determine questions arising between the parties relating to the execution of the decree. Sect. 588 specifies a large number of orders from which appeals lie, including many made in execution proceedings, but not

J. C.

1900

RAJA BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH.

including such an order as the one under discussion. It appears to their Lordships that the plain meaning of s. 2 is to make this order a decree appealable under s. 540. Mr. Ross has not shewn any reason why the words of the Code should not be construed in their plain and obvious sense. On the contrary, the obvious sense is that which best accords with ordinary convenience and ordinary rules of practice.

Turning from this purely technical question to the substance of the appeal, the High Court found the issue before them to be very simple. The District Judge held that it turned on the construction of ss. 211 and 244 of the Code. Sect. 244 prescribes that questions arising in execution, including this question, should be decided in the execution and not by separate suit. Sect. 211 enacts that in suits for possession of immovable property, "the Court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs)."

The effect of the District Judge's application of these sections is somewhat startling; because, though executing the Queen's order, he holds himself to be limited in point of time as though he was executing his predecessor's decree made in his own Court, and he counts the three years, for which alone he thinks he has the jurisdiction to estimate mesne profits, not from the date of the Queen's order, but from the date of the decree of his own Court.

Now, the plaintiff, it must be held, was entitled to possession throughout. In 1887 he got a decree for it, and had that been executed he would have had the profits. But there was an appeal, and in 1889 the High Court took a view adverse to him, and passed a decree in the face of which he could claim nothing. Five years afterwards he succeeded in displacing that decree and in re-establishing his original right to possession. Then he is told that from November 12, 1890, down to November 30, 1895, the law debars him from recovering the income of his property, and allows his opponent to keep it.

The District Judge expresses an opinion that the plaintiff

might have brought a separate suit for this income, and that if he has lost some years' profits it is by his own laches. How he could be charged with laches for not instituting a suit which with the decree of the High Court standing against him must have come to naught, is not easy to say. And if he were now to bring a fresh suit, or if he had done so in 1895 after reversal of the adverse decree, a substantial part of his just claim would be barred by art. 109 of the Limitation Act. But their Lordships will not further discuss the exact bearings of the two cited sections of the Code, because the High Court has given the simple and obvious solution of the difficulty which puzzled the District Judge.

The Court is now executing, not the District Judge's decree of 1887, but the Queen's order of 1895, which, by affirming the District Judge's decree, has adopted its terms and has carried on their effect down to a later date. All that the Courts below had to do, and all that this Board has now to do, is to construe the order of May, 1895, and to carry it into execution. Its meaning is hardly open to doubt. It affirms the District Judge's decree which awarded "future mesne profits." That signifies profits future to November 12, 1887. The order of 1895, speaking with the language of the decree of 1887, clearly carries all profits up to its own date. If there had been delay for three years after May 11, 1895, s. 211 would be called into operation with reference to the order of that date. But to call it into operation with reference to the decree of November 12, 1887, is to deprive the later order of its obvious meaning. It is true that one of the arguments used for the defendant was that the later order has no meaning as regards mesne profits because they are not expressly mentioned; but that is clearly wrong, and was hardly pressed at this bar.

Agreeing with the High Court, their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellant must pay the costs.

Solicitors for appellant : *Barrow & Rogers.*

Solicitor for respondent : *T. C. Summerhays.*

J. C.* 1900 — *June* 20; *July* 21.

MALKARJUN BIN SHIDRAMAPPA PASARE . . . . . } DEFENDANT;

AND

NARHARI BIN SHIVAPPA AND ANOTHER. PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Practice—Execution Sale—Nullity of Sale—Irregularity of Sale—Limitation—Civil Procedure Code, s. 311—*Act XV. of* 1877, *art.* 12 (*a*).

Redemption of a mortgage was refused, as it appeared that the mortgaged property had been sold in execution of a decree against the mortgagor, and that the plaintiff had neglected and refused to pray that it might be set aside.

An execution sale cannot be treated as a nullity if the Court which sells has jurisdiction to do so; and it cannot be set aside as irregular without an issue raised for that purpose and investigation made with the judgment creditor as a party thereto, nor under s. 311 of the Civil Procedure Code and art. 12 (*a*) of the Limitation Act, 1877, after one year from the date thereof.

An execution Court does not lose jurisdiction to sell because it serves notice on a person who does not represent the deceased judgment debtor, and afterwards erroneously decides that he does. Such decision is valid unless set aside in due course of law.

APPEAL from a decree of the High Court (Dec. 19, 1895) reversing in second appeal a decree of the Court of the Subordinate Judge of Sholapur (Aug. 22, 1893) which had affirmed the original decree in the suit dated February 2, 1891.

The suit was instituted on February 1, 1889, to redeem a mortgage executed by Nagappa on March 28, 1877, of four parcels of property in the District of Sholapur in favour of Shidramappa, represented by the appellant. The appellant pleaded that he, on June 9, 1880, purchased the property in an execution sale against Nagappa; and that the mortgage amount thereby became "merged" in the amount of the purchase-money; and that the sale could not be questioned in

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY DE VILLIERS.

this suit, for the execution creditor was not and could not be a party to it.

The First Court dismissed the suit, holding the sale to be good, and in first appeal this decision was affirmed.

The case then came before a Division of the High Court (Farran C. J. and Parsons J.), and as they differed in opinion it eventually came before three judges (Candy, Jardine, and Ranade JJ.), who remanded the case for an account of what was due under the mortgage.

The Chief Justice's opinion was that notice to the true representatives of the deceased judgment debtor was necessary: and "that unless such notice is issued and the representatives of the judgment debtor are given an opportunity of shewing cause against the enforcement of the decree by execution, a warrant to execute it issued, and an attachment levied under such warrant, and a sale held in pursuance of it are informal and irregular, and that the legal representative is entitled to have the same set aside as of right if he applies in time and an interest superior to his has not supervened." He added, "The further question, however, arises whether the several proceedings prior to and including the auction-sale are in such cases absolutely null and void, or whether they are not, though liable to be avoided at the instance of the legal representative of the judgment debtor, valid until set aside. The latter is, I think, the case. The proceedings and sale, if not challenged within the time which the law allows for that purpose, convey title to the purchaser. The decree is, as I have shewn, a living decree; the formal steps have been taken to effect a sale under it; the property attached and sold is property liable to be attached and sold under the decree; the law confers upon the Court the jurisdiction to sell. All is complete save that a person who ought to have had notice of the proceedings has not been notified. I can see no reason for holding that on that account the proceedings are a nullity and that nothing passes under the sale." . . . . "How, it may well be asked, can a purchaser know whether a notice under s. 248 has been issued or not, or, if issued, whether it has been duly served. . . . Again, how, if he inquires and finds that the notice has been

J. C.

1900

MALKARJUN BIN SHIDRAMAPPA PASARE v. NARHARI BIN SHIVAPPA.

served, is he to know that it has been served on the proper person though served upon the apparent heir? A will appointing an executor may subsequently be found. There is no security for him. Consider then the position of the legal representative. As a rule he is not damnified at all. The property of the dead man is made answerable for the debt of the dead man. If the legal representative objects to this he can come in and set the sale aside. This affords him full protection. Is he to be allowed, when the estate which has devolved upon him has had the benefit of the sale proceeds of the property sold, to fold his hands for twelve years and see whether the property will rise in value, and then, if it does, to evict the purchaser? I cannot bring myself to believe that such is the law." He held that the right to set aside the sale was barred by limitation at the date of his judgment (September 18, 1895), more then twelve years having elapsed since the sale (in 1880); and added, "Even now there is no suit to set it aside." He added, "It is found that they" (the plaintiffs) "knew of the sale. It is certain that they were not purposely kept in ignorance of it."

Parsons J.'s opinion was that the point for decision was: "Does a purchase at a sale in execution of a mere money decree convey any title to the purchaser when the application to execute the decree has been made against a person other than the legal representative of the deceased judgment debtor, and no notice under s. 248 of the Civil Procedure Code has been given to the legal representative?" He held that such a sale is "a nullity and as no valid or binding effect on the estate of the deceased in the hands of the legal representative": see *Baswantapa* v. *Ramu*. (1) He added, "If he" (the purchaser) "were dealing out of court for the purchase of the property, and were to purchase from a person other than the legal representative, he would acquire no good title. The Court gives no warranty of title, and I fail to see how a sale by a Court can possibly convey a better title than the persons named as the persons whose interests are to be sold could themselves give." He concluded that as such a sale "is

(1) (1884) Ind. L. R. 9 Bomb. 86.

an absolute nullity," the respondents need not sue to set it aside.

Candy J. considered it " unnecessary to decide whether the Court sale in 1880 was a nullity or only voidable," because the present suit to redeem, brought within twelve years of the sale, in effect challenged its validity. The absence of a formal prayer to set aside the sale could have been remedied by amendment. He thought the case fell within *Bhagvant Govind* v. *Kondi*. (1)

Jardine J. held that the sale was not a nullity, but that the suit was "effectual under all the circumstances" to set it aside.

Ranade J. thought the suit was maintainable. On the question whether the sale was a nullity or only irregular, he said: "The Court has jurisdiction over the subject-matter, i.e., the execution of its own decree, but over and above this jurisdiction over the subject-matter it ought also to have jurisdiction over the parties, and this it can only claim when the proper parties are allowed an opportunity to appear before it. Failure in this respect was as fatal to its jurisdiction as though it had no jurisdiction over the subject-matter itself." He held that "the omission to follow the procedure laid down in ss. 234 and 248 is not a mere formality, but is an illegality which affects jurisdiction." He also relied upon *Bhagwant* v. *Kondi*. (1)

Phillips, for the appellant, contended that the Chief Justice was right and the other judges wrong in the opinions which they severally expressed. The case of *Bhagwant* v. *Kondi* (1) was a case of an unauthorized sale out of court. The present case is broadly distinguishable, being that of a sale by a Court having jurisdiction in execution of a decree, while the sale in the case relied upon was a sale to the mortgagee's agent by the widows of a mortgagor without legal necessity of the equity of redemption during the minority of the mortgagor's son. In this case the Court which ordered the sale in effect, if not in terms, decided that Ramlingappa, the applicant for execution

(1) (1889) Ind. L. R. 14 Bomb. 279.

J. C.

1900

MALKARJUN BIN SHIDRAMAPPA PASARE *v.* NARHARI BIN SHIVAPPA.

as heir, represented the deceased. The Court had full jurisdiction so to decide ; and the appellant was entitled to rely upon that decision, even if incorrect, unless and until reversed or set aside. He was not bound to investigate the correctness of such decision. If incorrect, it did not render the sale void, though in a suit brought for that purpose within time it might be ground for setting it aside. That could not be done in this suit, not only for want of an express prayer to that effect, but also because the decree-holder is not and could not properly be a party to this suit, which seeks redemption of the mortgage only and ignores the sale altogether.

It was contended that the sale proceedings were regular, but if otherwise that the appellant had no notice of irregularity, and that he was a bona fide purchaser for value. A suit to set aside the sale for irregularity, if it had been brought, was barred : see Civil Code of Procedure, 311, and art. 12 (*a*) of the Limitation Act of 1877.

The respondents did not appear.

1900

July 21.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The respondents to this appeal represent the plaintiffs below, who instituted their suit on January 24, 1889. The defendant below is now represented by the appellant. The plaintiffs stated that on March 28, 1877, one Nagappa, whose heirs they are, mortgaged land to the defendant to secure the sum of Rs. 3,000 ; and they prayed for accounts and redemption of the mortgage.

The only defence which need now be considered was that in a suit instituted against Nagappa by a creditor of his named Vithal a decree was obtained, in execution of which Nagappa's interest in the property was put up for sale ; that it was purchased by the defendant on June 9, 1880, and that on October 11, 1880, possession was given to the defendant and had continued with him ever since. The plaint was wholly silent about this sale. The written statement went on to suggest that the plaintiffs might possibly contend that the sale was illegal because it took place without the plaintiffs being

joined in the certificate as heirs. The defendant said that he waited to hear whether the plaintiffs would make any such case, but that if they did he had an answer to it; and he pleaded by anticipation that the legality of the sale could not be impeached in the present suit, on reason being that Vithal, the decree-holder, was no party to the suit. Finally, the defendant put in a distinct plea that the claim for redemption cannot be maintained unless a suit is brought to set aside the sale.

The plaintiffs persisted in their suit according to its original frame. Eleven issues were settled by the First Court. The first issue was whether the mortgage debt merged in the subsequent purchase. In point of form that issue was not adapted to the facts of the case; nor, as it was treated by the First Court, was it adapted in point of substance. There was no issue adapted to examine the propriety of the execution proceedings.

The First Court dismissed the suit on the ground, as the learned judge expressed it, that the mortgage merged in the purchase. The plaintiffs appealed. They complained that proper issues had not been stated, and that they had been prevented from tendering evidence on points connected with the regularity of the execution proceedings. The defendant made objections to the same effect. But no further issues were stated, and no further evidence was given.

The judge of the Second Court, the first Appeal Court, who is styled the Joint First Class Subordinate Judge, A. P. at Sholapur, affirmed the decree below. As there has been no remand of the case on account of defects in the issues or evidence, his findings of fact are in this stage conclusive; and from them and the documents referred to in them the case appears to stand as follows. Vithal's decree was against Nagappa as principal debtor and Wyankappa as surety. The latter was Nagappa's son-in-law, being the husband of Tukava, one of the original plaintiffs in this suit. The date of the decree was June 27, 1877. It is an important document, but there is no copy of it in the record. It is spoken of as a simple decree for payment of money; but from the terms of the

J. C.

1900

MALKARJUN BIN SHIDRAMAPPA PASARE *v.* NARHARI BIN SHIVAPPA.

application for execution, which was made on November 22, 1878, it appears that the decree also related to some property which was mortgaged, and that on a previous application made in the year 1878 a trifling sum, Rs. 3 4*a*., had been realized by sale of that property. The application is in a tabular form, as required by the then Code of Procedure, the terms of which are those of s. 235 of the existing Code of 1882. The name of the person against whom the execution is sought is given as "the estate of the deceased Nagappa." The names of the parties are given as, first, Nagappa, deceased, by his heir Ramlingappa, and, secondly, Wyankappa. The relief sought is sale of the immoveable property of the deceased defendant for the realization of Rs. 65 and a fraction, being the balance remaining due under the decrée.

Notices were served upon Ramlingappa and Wyankappa. The former was the nephew of Nagappa, but was not his heir, the family having been divided as the Court has now found. On December 23, 1878, Ramlingappa appeared to shew cause. What then took place appears from an entry of that date. Ramlingappa stated: "As Nagappa separated from my father even during [my father's] lifetime I am not Nagappa's heir. His heirs are his daughters" (and he named them, meaning to name the plaintiffs). "I have not with me any estate of the deceased nor did I receive it. Therefore this decree should not be executed against me."

The Court's judgment was as follows: "The plaintiffs' application for execution is not against other property; it is against the 'estate' of the deceased. If [any] property belonging to you is included in that [estate], you should take legal steps after the attachment is levied."

After that the execution proceedings went on, with the result that the mortgaged property was put up on June 9, 1880, to be sold, subject to the charge then stated to be Rs. 3,680, and was bought by the defendant. It would appear that the property was considered to be worth nothing substantial beyond the mortgage debt, the highest biddings for all the lots only amounting to Rs. 9 12*a*.

The Second Court dismissed the plaintiffs' appeal. The

learned judge proceeded on the ground that Ramlingappa was a legal representative of Nagappa within the meaning of the Code, because he was a relative of the deceased and was possessed of some of his property. He also relied on the presence of Wyankappa as a party to the execution proceedings, arguing that knowledge of them was thus brought home to the plaintiffs, and that they could not be allowed to lie by for years and then, after the property had increased in value, to treat the sale as invalid. If, he said, they objected to the proceedings as irregular, they ought to have sued within the year allowed by the law of limitation.

The plaintiffs appealed to the High Court, when there appeared a great variety of judicial opinion. The appeal was first heard before Sir Charles Farren C. J. and Parsons J. The former of those learned judges pointed out the insufficiency of the reasons assigned by the Courts below for their decrees. He held that notice should have been served on Nagappa's heirs, and that in default of such notice the sale was informal and irregular, and might be set aside on an application made in good time. Then he addressed himself to the question whether the sale, however irregular, was a nullity; and he held that it was not, that it must be set aside before the plaintiffs could recover the property, and that they had never sued to set it aside. Parsons J., on the other hand, held that the sale was an entire nullity, and that the plaintiffs were entitled to proceed as if it had never taken place.

Upon this conflict of opinion the cause was referred to three other judges of the High Court. Ranade J. agreed with Parsons J. that the Court had no jurisdiction at all to make the sale, which was consequently a nullity. Candy J., without deciding the point, assumed for the purpose of his judgment that the sale passed the property subject to challenge in a regular suit, but he held the present suit to be a suit for that purpose. He further held that the suit was brought in good time, apparently on the ground that the right to set aside the sale is subservient to the right to redeem, and that the necessity of impugning the sale arises from the defendant resisting the suit to redeem. Jardine J. gives his reasons at length for

J. C.

1900

MALKARJUN BIN SHIDRAMAPPA PASARE v. NARHARI BIN SHIVAPPA.

holding that the Court had jurisdiction to order the sale and that the sale was not a nullity. But then he expresses agreement with Candy J. as to the nature of the present suit and its competency. The decree of the High Court does nothing, but directs accounts to determine what amount the plaintiffs must pay for redemption. It does not set aside the sale. It must, therefore, rest on the principle that the sale is an absolute nullity, though in fact only one of the judges on the first hearing and one on the second hearing was of that opinion.

This is indeed the cardinal point of the case, and it is one of great importance to all those who take property under the apparent security afforded by a judicial sale; which in India is conducted, not by the creditor who seeks payment, but by the Court itself. It is very unfortunate that the views which have prevailed in the High Court have not been supported by any argument at this bar. Their Lordships have done what they can to understand and appreciate the views of the two learned judges who think that the sale was a nullity, and to examine the authorities cited for that opinion, but they feel the disadvantage of being without a respondent.

It is not disputed that if the Court took proceedings wholly without jurisdiction the plaintiffs would remain unaffected by them, and two of the learned judges below go the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially, though to a minute extent, executed against Nagappa, and his estate was liable to make good the balance. To enforce this liability was within the jurisdiction of the Court. If a judgment debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact, the application made was against "the estate of Nagappa," and in another column Ramlingappa is named as his heir. The Court had jurisdiction to receive such an application, and either to reject it as defective or to order some further proceeding. If Ramlingappa had actually been successor in title nobody could have objected to the regularity of the proceedings. If there had been

a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any representative of the deceased was in existence, it was for the Court to say what steps should be taken. All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception. How was it lost afterwards ?

The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Kamlingappa. He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake it is true ; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts ; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business, no purchaser at a Court sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Court it ought to do.

As for authority, many cases are cited, but their Lordships cannot find any decision which supports the one now under

J. C.

1900

MALKARJUN BIN SHIDRAMAPPA PASARE v. NARHARI BIN SHIVAPPA.

discussion. That which is relied on by Candy J. is *Baswantapa* v. *Ranu*. (1) In that case the creditor of a man who was dead sued his mother in the character of heir, whereas the real heir of the debtor was his widow. In August, 1878, the creditor obtained a decree ex parte upon which execution took place, and the debtor's property was transferred to the defendant in November, 1880. In 1881 a son adopted by the widow of the debtor sued by her as his guardian to recover the land. The plea of bar by time under art. 12 of the Limitation Act was set up; and it was held that the article did not apply because the sale was a nullity, and there was no need to set it aside. In that case neither the debtor nor his estate were ever made subject to the decree of the Court, the liability never was established, and the process of execution had nothing to rest upon. The Court actually had not the jurisdiction which it purported to exercise. It is a different matter when the Court has by its decree established the debtor's liability, and is in the process of working it out against his estate.

Other decisions are cited in which proper notices have not been served after decree; but on examining them they all appear to be cases in which proceedings have been taken, either under s. 311 of the Code or by independent suit, within the year allowed for setting aside a sale. In such cases the necessity for distinguishing between irregularity and nullity does not arise; and general assertions of the invalidity of such sales, quite appropriate to the case in which and the purpose for which they are used, are only misleading when separated from their contex and applied to a case in which the distinction between irregularity and nullity is the cardinal point.

It is then necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. It may be that the plaintiffs could unite a suit to set aside with

(1) Ind. L. R. 9 Bomb. 86.

one to redeem, and that the defendant's anticipatory plea of misjoinder would if tried have been overruled. But that need not be discussed, because their Lordships think it to be beyond reasonable dispute that this is not a suit to set aside the sale.

The plaintiffs have deliberately refused to make it such a suit in the face of the defendant's challenge. It can only be called a suit to set aside a sale in the sense in which any other suit might be so called if it prayed relief inconsistent with the validity of the sale. Candy J. considers that the only thing wanting is a formal prayer to set the sale aside, and he says that if the plea had been raised that there was no such prayer leave would have been given to amend. In fact, the plea was raised at a time when the plaintiffs could amend at their option, but they did not do it. To give leave to amend at the hearing may have been in the discretion of the Court, but it would be very far from a matter of course to do so. It would be giving leave to institute a new suit with the date of an earlier one. The decree holder would be affected by it. He would be a proper party and (unless there is some recognised practice in India to the contrary, as to which Mr. Phillips could not inform the Board) a necessary one. The issues would be different. It cannot be denied that the conduct of interested parties at the time of sale may be a bar to them when they come to set it aside. The defendant said openly that if the plaintiffs made a case for setting aside the sale he had got an answer to it. If the plaintiffs then made such a case he must have been allowed to make his answer, and the issues raised by him or by the judgment creditor must have been tried. When defeated in the First Court the plaintiffs complained that proper issues had not been framed for trying points connected with the sale; which was true though it was their own fault but they did not ask to remodel their suit. When defeated in the Second Court they complained that the Court had drawn presumptions as to their knowledge of the sale without issues or evidence; which was true; but they did not ask to remodel their suit. In fact their case has been conducted throughout on the principle that the question of nullity was the sole

J. C.

1900

MALKARJUN BIN SHIDRAMAPPA PASARE *v.* NARHARI BIN SHIVAPPA.

question, and that they could not succeed on any other ground. To allow them now to shift their ground and to make a new case, and that, too, without allowing the defendant an opportunity of making the defence which he says he has in reserve, is wrong in principle, and is calculated to work practical injustice.

In a case of *Jagadamba Ckowdrani* v. *Dakhina Mohun* (1) the plaintiffs were reversionary heirs of a deceased Hindu, subject to the interest of his widows. They brought suits not long after the surviving widow's death to recover the estate. But adoptions had been made in 1853 and 1856, either of which, if valid, would displace the plaintiffs. The law of limitation applicable to the case (the Act of 1871) provided that a suit to set aside an adoption must be brought within twelve years after the date of the adoption. The plaintiffs sued, not to set aside the adoptions, but to recover the estate; and they argued that their title was good until an adoption was set up; that those who set it up must prove its validity, which accordingly might be controverted by the plaintiffs. There was difficulty in the case, because the expression "set aside an adoption" is inaccurate; an adoption cannot be set aside, though its validity may be impeached; and, in fact, the language was altered in 1877 before the appeal was heard. This Board found, however, that the expression had been frequently use in legal documents, and was known to Indian lawyers as a short way of denoting any process in which the fact or the validity of an adoption was disputed. On that ground they held that the Legislature must have intended to place the specified limit on suits for these purposes. Then the suit, being rightly described as one to set aside an adoption, attracted the consequence that the time for suing ran from the date of the adoption, and that the suits of 1873 and 1874 were barred. It is obvious that the expression "set aside a sale" is not attended by any such difficulty, because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside. That brings us to the last point in this rather

(1) (1886) L. R. 13 Ind. Ap. 84.

tangled controversy, namely, what is the period allowed for setting a sale aside?

Their Lordships have discussed the nature of this suit in detail because the two learned judges who affirm or assume the reality of the sale make the case turn upon it. But if the conclusion could be reached that the suit is one to set aside the sale, the result would be equally fatal to the plaintiffs. Art. 12 (*a*) of the Limitation Act of 1877 provides that a suit to set aside a sale in execution of a decree must be brought within one year after the sale is confirmed. That seems precisely applicable to the present case. It is said by Candy J. (with whom Jardine J. agrees) that it has not been contended that the plaintiffs were bound to sue within the year; and he refers to a text book for cases to shew that the article does not apply to a suit for a declaration that the sale is inoperative as against the plaintiff. Here the sale is, as their Lordships hold, and as the learned judge himself assumes, operative as against the plaintiffs, though liable to be set aside for due cause.

The only case cited by the learned judge himself is *Bhagvant Govind* v. *Koudi*. (1) In that case there was no judicial sale. Property was mortgaged by a Hindu, and after his death his widows, who seem also to have been guardians of his infant heir, sold the property to a trustee for the mortgagee. The heir sued to redeem, but not till after the expiry of the three years after his majority, which by art. 44 of the Limitation Act are the limit of time for setting aside a sale by a guardian. In overruling the plea of limitation the Court made the following observations: "The necessity of impugning the sale of 1863 to the second defendant arises from the second defendant's resisting the plaintiff's suit to redeem the mortgage, and is therefore subservient to that suit." That is the only reason assigned for overruling the plea.

Candy J. says that these observations apply exactly to the facts of the present case. Possibly they do; but their Lordships find it impossible to grasp the reasoning behind them. If it means that the right to set aside the sale is kept alive as

(1) Ind. L. R. 14 Bomb. 279.

J. C.

1900

MALKARJUN BIN SHIDRAMAPPA PASARE v. NARHARI BIN SHIVAPPA.

long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale might be held in suspense for sixty years. The two learned judges intimate that there is a limit of twelve years, but how that limit is arrived at does not appear. They treat the sale as valid until vacated, but apparently they allow it just so much validity as suffices to turn the possession of the mortgagee into the adverse possession of an absolute owner, and no more. But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law; and it seems to their Lordships that the case must fall either within s. 311 of the Code, or within art. 12 (*a*) of the Limitation Act of 1877, or within both; any way, there exists a bar by one year's delay.

The Limitation Act protects bona fide purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such, however, seems to be the effect of the doctrine of subservience laid down by the Bombay High Court. In the adoption case just cited from 13 Ind. App., this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left open for twelve years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe art. 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article.

The High Court ought to have dismissed the plaintiff's

appeal with costs, in accordance with the opinion of the learned Chief Justice. Their Lordships will now humbly advise Her Majesty to make that order, reversing the decree appealed from. The respondents must pay the costs of this appeal.

Solicitors for appellant : *Edwards, Heron & Co.*

J. C.
1900
MALKARJUN BIN SHIDRAMAPPA PASARE *v.* NARHARI BIN SHIVAPPA.

THIRUTHIPALLI RAMAN MENON AND OTHERS . . . . . } DEFENDANTS;

AND

VARIANGATTIL PALISSERI RAMAN MENON . . . . . } PLAINTIFF.

J. C.*
1900
June 22;
July 7.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Custom—Nairs of South Malabar—Adoption of Members of a Taravad—Powers of Karnavan.

Among the Nairs in South Malabar the karnavan of a taravad has large powers of management, limited as regards alienation. He can adopt females into the taravad when necessary to preserve it, but he cannot adopt strangers into the family, so as to make them and their descendants heirs to its property, without the consent of the other members, in the absence of necessity or of a proved custom to that effect.

APPEAL from a decree of the High Court (Sept. 15, 1896) reversing the decree of the Subordinate Judge of Malabar at Calicut (March 31, 1894) upon the question under appeal, namely, that of adoption.

The suit was between Nairs, in South Malabar, who are governed by Malabar law. The plaintiff, who was the last member of his taravad, suit to set aside a document by which his deceased elder brother, who during his life was the karnavan of the taravad, had adopted the defendants 1, 2, 6, and 7 as members of the taravad and heirs to his property. The adoption was found to be valid by the original Court. The decision

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY DE VILLIERS.

J. C.

1900

THIRUTHIPALLI RAMAN MENON v. VARIANGATTIL PALISSERI RAMAN MENON.

was reversed by the High Court on the ground that the consent of the plaintiff, the only anandravan, ought to have been obtained.

No decisions bearing upon the subject of adoptions by members of a Marumakkathayam family were produced by either side in the Courts below or before their Lordships, but evidence upon the subject was offered on both sides, the effect of which is sufficiently stated in the judgment of their Lordships.

The Subordinate Judge found that the circumstances of the family were such as to render an adoption necessary, and that, although the junior member would have a right to object to an improper adoption, the absence of consent did not invalidate one which was in other respects proper. He held, however, that the plaintiff, as senior member of the family reconstituted by the adoptions, was the karnavan, and as such was entitled to possession and management of the property.

The High Court, on the other hand, held—1st. That there was no decision of the Courts in support of the defendants' contention that the karnavan of a taravad had absolute power to adopt into his taravad without the consent of the other members of such body. 2nd. That the defendants had failed to prove any custom establishing such a power in the karnavan. 3rd. That on principle, and seeing that under the Marumakkathayam system of law which governed the parties an unlimited number of persons of both sexes could be adopted, it did not seem right to hold that such a power resided in the karnavan alone, and could be exercised by him either without the consent or against the expressed wish of his co-sharers.

Davies J. held that the power to adopt only arose when the family was reduced to a single member incapable of bearing issue, when the necessity to adopt for the purpose of continuing the family, if such a necessity ever existed, would become absolute.

Mayne, and *C. W. Arathoon*, for the appellants, contended that the decision of the High Court rested on the principle

that an adoption was outside the scope of a karnavan's authority; that it dealt with interests other than his own, which required the consent of the parties affected by it. It was contended that there was no distinction to be drawn between the power of adoption possessed by the karnavan of a Malabar taravad and that possessed by the father of a joint Hindu family. Adoption on the west coast of Madras depends on the habit of polyandry, and on the family system arising out of that practice. This system was described by the late Muttusami Iyer, Judge of the High Court at Madras, in a memorandum containing a clear summary of Malabar law and appended to the report of the Malabar Marriage Law Commission of which he was the President: see p. 49 of the report. That description is as follows: "In his simplest form a taravad or Marumakkathayam family consists of a mother and her children living together with the maternal uncle as their karnavan. In its complex form it cosists of several mothers and their children or their descendants in the female line, all tracing their descent from a common female ancestor and living together as a joint family in subjection to the power and under the guidance and control of the senior male for the time being as its head or representative. The link of relationship is descent from a common female ancestor, and the bond of family union is subjection to a common karnavan. The notion of taravad property is that the entire family is its owner, that it is impartible except by common consent, and that each individual member is entitled to be maintained in his or her taravad home and to the fruits of joint beneficial enjoyment. The joint family is called a taravad, and each of the mothers and her children and descendants in the female line constituting the taravad is called a taivali or the line of a single mother. In its secondary sense the term refers to a branch of the family having separate possession of a portion of the family property for convenience of enjoyment without prejudice to the unity of taravad interest or to the general control of the taravad karnavan. The term includes also a branch holding self-acquired property and at the same time retaining its joint interest in taravad property. If the taravad is broken up by

J. C.

1900

THIRUTHIPALLI RAMAN MENON v. VARIANGATTIL PALISSERI RAMAN MENON.

partition made by common consent, each branch is called a new or branch taravad and the divided kinsmen are called attaladakkan or reversionary heirs. It is noteworthy that the relation of husband and wife, or of father and child, is not inherent in the conception of a Marumakkathayam family. In cases in which a Nayar woman resides with her husband, it is still considered to be in accordance with immemorial usage to send her back to her own taravad immediately after or very shortly before his death, and not to remove his corpse for cremation until she is first sent away. The person that begot a child on a Marumakkathayam female was originally regarded as a casual visitor, and the sexual relation depended for its continuance on mutual consent." In adoption, according to some systems, you adopt a female and then appoint a male to be the manager. According to others, a female is adopted and becomes manager also: See Wigram's Malabar Law, 11, 12; Strange's Manual of Hindu Law, sect. 403. There are no sacred books of the old Malabar law. Reference was made to *Munda Chetti* v. *Timmaju Hensu* (1); *Subramanyan* v. *Paramaswaran* (2), in which case the parties were subject to Marumakkathayam law, and the validity of a male adoption is discussed. Marumakkathayam means descent in the line of a nephew or sister's son in opposition to Makkathayam, which means descent in the line of sons. The necessity to adopt arises because otherwise the family would become extinct, for without adoption the property would get into the hands of the last survivor, and then the family would be extinct, and the property could be alienated by the last survivor either by gift or testament, unless escheat is enforced: see *Vasudevan* v. *Secretary of State for India* (3); *Alami* v. *Komu.* (4) As to the status and functions of a taravad and powers of a karnavan: *Varanakot* v. *Varanakot* (5); *Kalliyani* v. *Narayana.* (6) The fact that the younger brother withheld his consent is not enough to

(1) (1863) 1 Mad. H. C. R. 380, 383.
(2) (1887) Ind. L. R. 11 Mad. 116, 119.
(3) (1887) Ind. L. R. 11 Mad. 157, 170.
(4) (1888) Ind. L. R. 12 Mad. 126.
(5) (1880) Ind. L. R. 2 Mad. 330.
(6) (1885) Ind. L. R. 9 Mad. 266.

invalidate an adoption. The Nairs have religious ceremonies, and it is a necessary duty to adopt, which is not to be omitted because of capricious opposition.

Branson, for the respondent, contended that the High Court was right in finding on the evidence that the appellants had failed to prove the existence of any custom giving the karnavan the right, either without the consent or against the wish of the other members of the taravad, to adopt any person he chose into the taravad. There is no sufficient authority in law to establish the doctrine that the right of adoption into a family belonging to the Nair tribe is vested in the karnavan alone. Even if he possessed that right on any analogy to a Hindu father, by the ordinary Hindu law, it is not shewn to be exercisable by him, either by law or custom, without the consent or against the wishes of the other members of the taravad. The right to adopt is only absolute and exercisable at the option of the karnavan when he happens to be the sole surviving member of the taravad, after all hope of issue from the females of the taravad is extinct. The Subordinate Judge was right in holding that the respondent as representing his father was entitled to the properties in dispute, since his father was, on failure of these adoptions, the sole surviving member of the taravad.

Mayne replied.

The judgment of their Lordships was delivered by

1900
July 7.

LORD LINDLEY. The question raised by this appeal is whether the elder of two brothers, who were the two surviving members of their taravad, and the elder of whom was its karnavan, was entitled to adopt four persons so as to make them members of the taravad without the consent of the younger brother. The younger brother after the death of the elder sued to set aside the adoption. The adoption was declared valid by the Court of first instance, but this decision was reversed by the High Court of Madras. The persons adopted have appealed from this decision to Her Majesty in Council.

The younger brother has died since the action was commenced, and has left a will, and the real controversy between

J. C.

1900

THIRUTHIPALLI RAMAN MENON v. VARIANGATTIL PALISSERI RAMAN MENON.

the parties is to whom the property of the taravad belongs. This controversy, however, is not now before their Lordships for adjudication. The only question before them is whether the High Court of Madras was right in deciding the adoption to be invalid.

The litigation is between Nairs in South Malabar, and has to be decided according to the laws and usages of those persons. Those laws and usages are very peculiar; some of them are so well established as to be judicially noticed without proof. But others of them are still in that stage in which proof of them is required before they can be judicially recognised and enforced. The Nairs are persons amongst whom polyandry is legally recognised; and descent of property through females is acknowledged law. A right (and perhaps duty) to adopt females into the family or taravad when necessary to preserve it appears also to be in accordance with their law. Speaking generally, it may be safe to say that this right is vested in the karnavan or head of the family. This is so stated in Strange's Manual of Hindu Law, sect. 403. So far their Lordships are prepared to assume the law peculiar to the Nairs to be established, and not to require proof in any particular case. But beyond this they are not perpared to go. The passage in Strange's Manual does not really mean more than above stated. There is no sacred book or other writing having legal authority, and there is no series of decisions which can be appealed to in order to determine the circumstances under which, and the consents, if any, subject to which the karnavan for the time being can adopt strangers into the family, and thereby make them and their descendants heirs to its property. Their Lordships are clearly of opinion that under these circumstances the burden of proving the validity of the adoption made in this case is upon those who assert its validity; and that the only question which their Lordships have to consider is whether the appellants have shewn that the adoption in dispute in these proceedings is in accordance with the law or custom of the Nairs.

Mr. Mayne in his very able argument drew attention to all the authorities bearing on the point, and to some previous

adoption deeds, and to the verbal evidence adduced by the parties in this particular case. The authorities and adoption deeds do not really come nearly up to what is wanted; not one of them shews that a karnavan ever adopted a stranger into the family without consulting the other members of it.

The witnesses called at the trial certainly do not prove any custom warranting such an adoption. The witnesses called by the plaintiffs distinctly negative it. Those called by the defendant say in chief that the custom goes this length; but not one of them can give an instance in which he knew it was done. The witnesses are the ninth, tenth, and eleventh. The ninth, the Rajah of Calicut, however, stated distinctly in re-examination that the karnavan in such a case as that before the Court could not adopt without the consent of his brother, unless he was an outcaste or insane. Upon such evidence it appears to their Lordships that the balance is against and not in favour of the validity of the adoption which they have to consider. Certainly its validity is far from being established.

Large as the powers of a karnavan appear to be, those powers are essentially powers of management. He cannot apparently alienate the family property without the consent of the other members of the family (anandravans), although an unreasonable wrongheaded opposition may probably be overruled. His limited power of alienation renders it improbable that he should have the wide power of adoption contended for by the appellants, the power, i.e., without consulting other members of the family, of introducing strangers into the taravad and making them heirs to its property. Such a power may be essential to the preservation of the taravad when the last possible karnavan has been reached, but the possession of such a power by any karnavan who is not the last surviving head of his taravad seems to their Lordships to be unnecessary, and to be unjust to those members of the family who may survive him and become karnavans in their turn. In the absence of proof, it would be contrary to sound legal principles to hold that any such power was conferred by any alleged custom.

J. C.

1900

THIRUTHIPALLI RAMAN MENON v. VARIANGATTIL PALISSERI RAMAN MENON.

Their Lordships are of opinion that the decision of the High Court is correct, and they will humbly advise Her Majesty that this appeal should be dismissed. The appellants will pay the costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitor for respondent : *R. T. Tasker.*

GARURUDHWAJA PARSHAD SINGH. . . DEFENDANT;

AND

SAPARANDHWAJA PARSHAD SINGH . . PLAINTIFF.

J. C.*

1900

May 8, 10; *June* 27.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Custom of Primogeniture—Evidence—Indian Evidence Act, s. 32, *sub-s.* 5 ; *ss.* 49, 60—*Admissibility of Statements by deceased Persons.*

Held, on the evidence, reversing the judgment of the High Court, that the appellants had satisfied the serious burden of proving a special family custom of descent by primogeniture.

The evidence shewed that for a period of nearly eighty years from the time of the British occupation of the district in which lay the estate in suit, the enjoyment had been consistent with the alleged custom, and for the earlier and greater part of that term had been inconsistent with any other legal basis. Also, that in two other families in the same district, derived from the same ancestor as the parties to the suit, the alleged custom prevailed.

A witness may state his opinion as to the existence of a family custom, and give as the grounds thereof information derived from deceased persons. But it must be independent opinion based on hearsay, and not mere repetition of hearsay : see Indian Evidence Act, s. 32, sub-s. 5 ; ss. 49 and 60. Its weight depends on the character of the witness and of the deceased persons.

APPEAL from a decree of the High Court (Feb. 7, 1893) reversing a decree of the Subordinate Judge of Aligarh (Jan. 14, 1889).

Upon the death of Girparshad, the owner of the estate in suit, the appellant, as his elder son, took possession therof,

**Present* : LORD DAVEY, LORD ROBERTSON, SIR RICHARD COUCH, SIR HENRY DE VILLIERS, and SIR FORD NORTH.

claiming that there existed in the Beswan family, to which the parties belonged, a custom of primogeniture by which the eldest son was entitled to succeed to the whole estate, the younger son being only entitled to maintenance. Thereupon the respondent, the younger of the two sons of Girparshad, sued on June 30, 1886, to recover half of the estate, alleging title thereto under the ordinary Hindu law.

The question was whether, under the circumstances stated in the judgment of their Lordships, the appellant had proved the alleged custom.

The Subordinate Judge held that the evidence proved the existence of a custom of succession by right of primogeniture in the family, and that such custom had been shewn to be of sufficiently long standing to have acquired legal force and validity as an ancient and good custom.

The High Court (Blair and Tyrrell JJ.) held that the evidence established :—

1st. That there was floating in the air an impression "current amongst many members of the Beswan family that inheritance in the family proceeded by the rule of primogeniture." 2nd. That such impression was due to the fact that in several successive devolutions the possession and control of the property fell to the eldest son, passing thus from Nawal to his eldest son, Harkishen, and then to Harkishen's eldest son, Jey Kishore, and from him, after a brief tenure by his eldest son, Girdhar Singh, to Girparshad Singh, the father of the present litigants. 3rd. That such impression received from the period of Girparshad's life a force and solidity probably unknown before. 4th. That Girparshad, a man of wealth and culture, finding such a custom obtained in two branches of his family, was not unnaturally ambitious to perpetuate and exalt his own family by a declaration that such a custom governed it. 5th. That the customs of seating the head of the family on the gaddi, and presenting nazars to him, which the Subordinate Judge had accepted as evidence that in the Beswan family the rule of primogeniture obtained, did not in fact support any such conclusion, but only shewed that the

J. C.

1900

GARURUDHWAJA PARSHAD SINGH v. SAPARANDHWAJA PARSHAD SINGH.

Beswan family pretended to a dignity to which they conceived that their descent entitled them. 6th. That Girparshad availed himself of the impression which the accident of several devolutions to the eldest son had given rise to record in the wajib-ul-arzes that such had been the custom of the family, and that such was the law by which the family was to be ruled in the future. 7th. That, though the wajib-ul-arzes of 1873 stated the custom of primogeniture, earlier wajib-ul-arzes did not make mention of such custom, thereby affording strong evidence that no such custom existed. 8th. That in the earlier collectorate proceedings reference had been made to "the law and custom" of the Hindus as regulating the descent of the property of the family; and that, in the answer to the questions of the Collector as to the rules of succession of this estate, the Rajahs of Mursan and of Hathras had spoken of "the custom of the Hindus" as regulating the same, and not of any custom governing this particular family. 9th. That the wajib-ul-arzes prepared under the directions of Girparshad set out his pretensions as to the status of his family. 10th. That the failure of Jiwaram, the brother of Harkishan, to prove his right to one-half of the property in the Courts was due in the first instance to his poverty, and afterwards to disinclination to sue on grounds personal to himself.

Branson, for the appellant, contended that on the evidence the High Court ought to have held that the custom of primogeniture had been well-proved as a custom regulating the descent of property in the Beswan family and binding on its members. With regard to the admissibility of that portion of the oral evidence which consisted of the opinions of witnesses based upon statements made by persons who are dead, reference was made to Indian Evidence Act, ss. 35, 49, and 60. As to the effect to be attributed to statements contained in wajib-ul-arzes, see *Rani Lekraj Kuar* v. *Mahpal Singh* (1), *Uman Pershad* v. *Gandharp Singh* (2), and *Thakur Nitrpal Singh* v. *Thakur Jai Singh Pal* (3), which latter case contains a

(1) (1879) L. R. 7 Ind. Ap. 63. (2) (1887) L. R. 14 Ind. Ap. 127.
(3) (1896) L. R. 23 Ind. Ap. 147.

discussion as to the bearing of the custom of gaddinashini upon that of primogeniture.

The respondent did not appear.

1900, June 27. The judgment of their Lordships was delivered by

LORD DAVEY. The question on the appeal relates to the devolution of the ancestral estate of Thakur Girparshad Singh, who died in the year 1880. The defendant in the suit and present appellant is the eldest son of Girparshad, and contends that there is a custom of primogeniture in the family, and that, consequently, he is alone entitled to succeed to the estate. The plaintiff in the suit is his younger brother. He denies the existence of the alleged custom, and claims to share in the estate in accordance with the ordinary Hindu law of inheritance. The Subordinate Judge decided in favour of the alleged custom, and dismissed the suit with costs; but his decision was reversed by the High Court of Allahabad, and the appeal is from the judgment and decree of the latter Court. It is unfortunate that the plaintiff and present respondent has not appeared on this appeal. There are questions of the admissibility as well as the effect of evidence on which their Lordships would have been glad of the assistance of counsel for the respondent.

The parties belong to a family known as the Beswan family. This family and two other families in the same district, called the Mursan and Hathras families, are Jat families of the Tenwa Clan, and are descended from a common ancestor named Nandram Faujdar, who is said to have died in the year 1695. The Mursan family is said to have been founded by Khushal, son of Zulkaran, one of the fourteen sons of Nandram. The Beswan and Hathras families alike have their descent from Jai Singh, another son of Nandram. The Hathras branch was divided from the Beswan branch in the person of Dyaram Singh in the fourth generation from Nandram, who died in the year 1823. The circumstances under which this separation took place are in controversy, and will be more fully considered hereafter. In the year 1817 Dyaram was

J. C.

1900

GARURUDHWAJA PARSHAD SINGH *v.* SAPARANDHWAJA PARSHAD SINGH.

deprived of the greater part of his possessions in consequence of his resistance to the British military forces, and his family do not now reside at Hathras.

It appears from the evidence, and was accepted as a fact by both Courts, that the custom of primogeniture prevails in both the Mursan and the Hathras families. Their Lordships attach importance to this admitted fact. It points to a custom derived from a common ancestor, and lends strong antecedent probability to the appellant's case. The present Rajah of Mursan was called as a witness by the appellant; but he was supporting the respondent with a loan of money to be used for the purpose of the litigation. He could not, therefore, be expected to be very friendly to the appellant. But he does not venture to deny the existence of the custom in the Beswan family, and, singularly enough, had made no inquiry on the subject. He says: "In my family the custom of gaddinashini prevails. When a gaddinashini dies leaving several sons, one of them becomes gaddinashini and inherits all the property, and the others only get maintenance. I have heard that that custom of gaddinashini prevails in the Hathras Raj family. I do not know whether the custom of gaddinashini prevails in the Beswan family or not. I have no personal knowledge about it, and I did not make any inquiry on the point." Rajah Harnarain Singh, the present representative of the Hathras family, is a son adopted by the widow of the preceding Rajah, aud was only twenty-two years of age at the time of the trial. He also is said to be unfriendly to the appellant on account of some previous litigation with Girparshad, in which the latter claimed his estates. Rajah Harnarain does not profess to know anything about the question in issue.

There are no records of any kind prior to the British conquest in 1803. The most important documentary evidence since that date is the record of a proceeding of the Court of the Collector of Aligarh district dated November 22, 1809. From the pedigree which is set out in the judgment of the Subordinate Judge and was accepted in the High Court, it appears that Bhuri Singh, the third in descent from Nandram, died in the year 1775, leaving two sons, Nawal and Dyaram, who, as

already mentioned, was the founder of the Hathras family. Nawal Singh is stated to have died before 1800, leaving two legitimate sons, Harkishen (the eldest) and Jiwaram, and three illegitimate sons. Harkishen succeeded to Beswan in exclusion of Jiwaram, his younger brother, and died in 1808. He had two legitimate sons (who are stated to have been uterine brothers), Jey Kishore and Jogul Kishore. It is disputed whether Jogul Kishore survived his father ; but for reasons to be presently stated, their Lordships think, with the Subordinate Judge, that the weight of evidence is in favour of his having done so, and of his having died without issue shortly afterwards. Harkishen also left three illegitimate sons. By his order of November 22, 1809, Mr. Elliot, the Collector of Aligarh, directed that a parwana be issued to Dyaram and Rajah Bhagwant Singh (the then representative of the Mursan family) asking them to give information whether there is any son of Harkishen other than Jey Kishore, and whether, acccrding to the custom of Hindus, the property of Harkishen devolves upon Jey Kishore, and whether the sanads of jagir and istimrar should he granted to Jey Kishore.

The reply of Dyaram to this request was in the following terms :—

"After paying my compliments and expressing my wish to pay my respects to you, I beg to state that I received your kind note inquiring whether Jey Kishore was the rightful person, owing to the death of Thakur Harkishen, and granting the sanad of jagir and istimrar to Barkhurdar (1) Jey Kishore on condition of its being ascertained that he was entitled to it under the custom of the Hindus. It is known to you that Thakur Harkishen and others, and now Jey Kishore, are among my farzands (2) (sons). Formerly Thakur Harkishen, who was senior in age to his other four brothers, was distinguished from, and surpassed them all, by his qualities as a sirdar and head, and also during his lifetime his four other brothers were of one mind with him and obedient to his orders, and carried on the affairs zealously. In the time of

(1) Literally may you eat the fruit of life. (2) Literally means children.

J. C.

1900

GARURUDHWAJA PARSHAD SINGH
v.
SAPARANDHWAJA PARSHAD SINGH.

Thakur Harkishen Barkhurdar, Jey Kishore, who is also senior in age to his other four brothers, and is distinguished from, and surpasses them all, used to be called the heir-apparent and successor. At present, after the death of the said Thakur, he has the control of all the affairs, small and great, of his father, and it is Jey Kishore who is entitled to the favours of the British Company. In accordance with their usual practice, the turban of Sirdari was tied round the head of Jey Kishore. It is hoped that the sanads of jagir and istimrar will be kindly granted to the said Barkhurdar.

"Submitted for information. Further respects.

"(Sd.) Thakur Dayaram Singh, of Hathras,
son of Shipuri (?)."

The reply of the Rajah of Mursan was in almost the same words, and they were evidently written in concert.

Upon these reports a further order, dated December 18, 1809, was made by the Collector in the following terms :—

"On the 14th petition was made by Thakur Dyaram stating that after the death of Thakur Harkishen his estate devolves upon Thakur Jey Kishore, his eldest son, and to-day a petition was made by Rajah Bhagwant Singh, stating that Thakur Jey Kishore was the eldest son of Thakur Jey Harkishen, deceased, and that the estate of the deceased Thakur devolved upon him, and consequently all the brethren, deeming Thakur Jey to be the rightful person and eldest son, tied the turban of the Sirdari." The petitions were then ordered to be forwarded to the Board.

The terms of this order clearly shew the sense in which the Collector understood the reports of Dyaram and the Rajah of Mursan. Accordingly two sanads, dated January 19, 1810, were granted by the Government to Jey Kishore. By the first of these documents, after noticing that under the orders of the Governor-General Taluka Beswan had been settled with and granted to Harkishen for his lifetime and his death before the issue of the perpetual sanad of the taluka, it was stated that his Excellency therefore thought it advisable and proper that instead of the said deceased the taluka should be maintained in

the name of his eldest son, Thakur Jey Kishore, for his lifetime at the jama therein mentioned. The second sanad contained the grant of a village called Jhanga by way of jagir in similar terms.

From the two letters of Dyaram and the Rajah of Mursan, it appears that Jey Kishore had then four brothers living. The inference is that Jogul Kishore, his uterine brother, was then living. It is true that in two documents, dated March 16, 1845, it is stated by Tikam, then Rajah of Mursan, and by a tehsildar named Sayed Hardar Ali, that Harkishen had four sons only, Jey Kishore and three illegitimate sons. It is more probable that (Jogul Kishore having died young and childless) his existence was forgotten or overlooked after a lapse of nearly forty years, than that Dyaram and the Rajah Bhagwant were mistaken, and their Lordships agree with the Subordinate Judge that the balance of evidence is in favour of Jogul Kishore having survived his father. The witness Dharag Singh, whose evidence is vouched by Blair J., says, indeed, that Jogul Kishore died in his father's lifetime; but in an earlier part of his examination he had said that he "did not know whether Jogul Kishore died in his father's lifetime or after his death." This witness was born some years after Jogul Kishore's death and was speaking from hearsay only, and there are many witnesses of the same kind, some of whom say that Jogul Kishore died in his father's lifetime, and others of whom say he survived him. The oral evidence (even if admissible) is quite inconclusive.

Jiwaram might have claimed to share the taluka with his brother Harkishen, and he as well as Jogul Kishore (if living) might have claimed to share it with Jey Kishore if the succession was regulated by the ordinary Hindu law. From the record of a proceeding before the Deputy Collector and Settlement Officer of the District of Aligarh on April 30, 1846, it appears that on the death of Jey Kishore, which took place in 1844 or 1845, Ram Pershad and others, sons of Jiwaram, who was also then dead, claimed to be entitled to one-half of the estate of Beswan, and to have a settlement thereof made in their names. This claim was dismissed by the Collector. The

J. C.

1900

GARURUDHWAJA PARSHAD SINGH v. SAPARANDHWAJA PARSHAD SINGH.

document contains a history of the case gathered from a perusal of "the papers in the records of the Collectorate and those received from the Commissioner's office, as well as those filed in the Settlement Department, together with the records of the Khazi's office, civil side, relating to Jiwaram and Jey Kishore, deceased minor, and fixing a monthly allowance for Jiwaram." Shortly told, the story is that Jiwaram was appointed manager of the estate during Jey Kishore's minority, but in consequence of some irregular proceedings on his part, which were thought to manifest an intention to dispossess his nephew, litigation ensued, with the result that Jiwaram was deprived of the management of the estate, and subsequently an allowance of Rs. 400 a month was made to him, which he continued to receive during his lifetime. On his death Jey Kishore stopped the payment, but the Commissioner by a rubkar of August 12, 1836, directed that until an order should be made to the contrary, or till the institution of a civil suit to establish right by the heirs of Jiwaram, it should be continued as theretofore, and the heirs of Jiwaram received the monthly allowance during the life of Jey Kishore. There is other evidence that Jiwaram enjoyed an allowance of Rs. 400 per mensem for maintenance, and there is no evidence whatever that he brought any suit in the Civil Court to dispute his brothers' or his nephew's possession of the family estate. Nor did the sons of Jiwaram ever bring any suit to contest the possession of Girdhar, the eldest son and successor of Jey Kishore. The Collector by a subsequent proceeding held the allowance of Rs. 400 per mensem to be a pension only, and he reduced the allowance to Rs. 120 per mensem, divisible between the sons of Jiwaram. They thereupon commenced a suit to establish their right to the Rs. 400 as a malikana allowance, and applied for leave to sue in forma pauperis, but the claim was rejected by the judgment of the District Judge of June 25, 1856.

It thus appears that Harkishen succeeded his father Nawal in exclusion of his younger brother Jiwaram, and on his death in 1808 Jey Kishore succeeded in exclusion, not only of his younger brother Jogul Kishore, but also of his uncle Jiwaram,

and, on Jey Kishore's death in 1844 or 1845, Girdhar, his eldest son, succeeded to his estate. Jiwaram and his sons, though challenged to assert their claim to share in the estate by a civil suit, abstained from doing so, and contented themselves with an allowance for maintenance. Girdhar died about eighteen months after his father, and was succeeded by his only brother, Girparshad. But as the latter was a minor throughout his elder brother's tenure of the estate, no strong inference can be drawn from his not claiming to share in the estate. Girparshad died early in 1880. It results that for a period of nearly eighty years from the time of the British occupation, the enjoyment has been consistent with the alleged custom, and for the earlier and greater part of that term has been inconsistent with any other legal basis.

The High Court minimise the inference to be drawn from these successive descents of the estate to an eldest son in three generations and the circumstances accompanying them. (1.) They say that the inquiry made by order of the Collector of Dyaram and Rajah Bhagwant Singh in 1809 was directed to the custom of Hindus, and not to the custom peculiar to this family, and they suggest that the reports made in pursuance of that inquiry related only to management and control of the estate, not to property. (2.) It is suggested that Jiwaram was awarded his allowance of Rs. 400 a month as compensation for being dispossessed of the zemindari, and, being content with his position, did not care to claim a share in the estate.

Their Lordships observe on the first point that the customs of Hindus would include any custom regulating the succession in a particular family, and that the inquiry was whether the property "devolves on Thakur Jey Kishore." They have already observed that the Collector evidently understood the replies of Dyaram and the Rajah of Mursan as directed to the question who was entitled to the property. The sanads were grants of the property to Jey Kishore, described as eldest son, and in short the transaction was not merely a settlement of the estate in his name for the purpose of revenue as suggested in the High Court. On the second point, it is extremely unlikely that Jiwaram would have rested content with an

J. C.

1900

GARURUDHWAJA PARSHAD SINGH
v.
SAPARANDHWAJA PARSHAD SINGH.

allowance if he had a claim to one-half the estate which he could prosecute with any prospect of success. Jiwaram (apparently) and his sons certainly asserted a claim to be sharers in the estate, though they never ventured to bring their claims to the test of a legal decision. The records of the Collectorate, so far as concerns the relations between Jiwaram and his sons on the one hand and Jey Kishore, and afterwards Girdhar on the other, do not disclose a picture of a perfectly united and contented family.

But the learned judge in the High Court thought that the acquiescence of the descendants of Nawal Singh in the usurpation of Dyaram was far more impressive than the acquiescence of Jiwaram and his descendants. Their Lordships must, therefore, examine what is known of the relations between Nawal Singh and Dyaram and their respective descendants. Nawal Singh and Dyaram were sons and, so far as appears, the only sons of Bhuri Singh, who is said to have died in the year 1775. The Subordinate Judge says that Dyaram forcibly wrested the bulk of his father's property, including taluka Hathras, from his elder brother on their father's death, and, being a man of great energy, he managed to dispossess the other descendants of Nandram from their estates and annex their estates to his extensive possessions. His authorities for this statement are apparently the settlement reports of Aligarh made by Mr. Thornton in 1834, and by Mr. Smith in 1874, and Atkinson's Gazetteer published in 1875. These works are not before their Lordships, and they cannot say whether they bear out the learned judge's statement, which, however, seems to go further than the oral evidence of tradition warrants. It may be that the reports and gazetteer in question are not strictly evidence of the truth of all the statements contained in them; and it may be that if examined they would not bear out the conclusions drawn from them by the Subordinate Judge. They were, however, used apparently without objection, and probably no objection would be taken to their being read for what they are worth in a similar case in this country. But if you exclude evidence of tradition, what evidence is there that Hathras ever was part of the ancestral property of Bhuri

Singh? In the last century, when the Mogul Empire was breaking up, and when (to quote Blair J.) "law was in abeyance," it was not uncommon for an able and energetic man to carve out a large property for himself by the sword at the expense either of his own relatives or of strangers. If you look to tradition as disclosed by the oral evidence, the statements as to Hathras are conflicting. Indeed, Keheri Singh says that Dyaram acquired the Hathras estate from the Poreh Thakurs. In the opinion of their Lordships, it is impossible to presume a partition between the brothers, or to say with any approach to certainty whether any or what portion of Dyaram's possessions was or was not ancestral property, or from whom or by what means they were acquired. All that can be said is that tradition points to his having acquired them by force and not by right. Dyaram was at first confirmed in possession of his estates by the British Government, but in 1817 was deprived of the bulk of them for rebellion. It appears from documents in evidence that twenty of Dyaram's villages under the appellation of taluka Shahzodpur were conferred on Jey Kishore, and thirty-one were conferred on Jiwaram. It is probable that these villages were only a comparatively small part of the estates confiscated by the Government. The learned judges in the High Court ask why the heirs of Nawal Singh did not then ask for reinstatement in the fiefs which had been seized by Dyaram, as had been alleged, in violation of Nawal Singh's right of primogeniture. And it is this acquiescence to which they attach so much importance. Their Lordships cannot agree, for the simple reason that they do not know enough of the facts or circumstances, or of the motives or policy of the British Government, to form any reliable opinion on the subject.

Their Lordships now turn to the oral evidence in the case. No less than fifty-six witnesses were called and examined on behalf of the appellants. Their evidence mainly divides itself into two branches: (1.) Evidence of the existence of the custom of gaddinashini in the Beswan taluka, and of the successive holders of the taluka within living memory having sat on the gaddi and received the customary offerings. (2.) Evidence

J. C. 1900

GARURUDHWAJA PARSHAD SINGH v. SAPARANDHWAJA PARSHAD SINGH.

of tradition relating to the family learnt by the witnesses from their deceased relatives and others.

In commenting on the evidence of the custom of gaddinashini, the High Court say : "In order to constitute that a valid argument it ought to have been shewn, not only that gaddinashini and the presentation of nazars was the ordinary concomitant of the possession of an impartible Raj, but also that it was an exclusive attribute of families in whom the custom of primogeniture prevails." The judgment of the High Court was delivered on February 7, 1893. Subsequently to that date a case of *Thakur Nitrpal Singh* v. *Thakur Jai Singh Pal* (1) (which in many of its circumstances is strikingly like the present one) was before this Board. (1) The case related to the succession to the ancestral property of a Rajpoot family long settled in the Agra district. In delivering the judgment of their Lordships, Lord Hobhouse observes :—

"The other remark is a suggestion that there is no necessary connection between gaddinashini and primogeniture. That may be so ; but it is impossible to read the evidence without seeing that the witnesses on both sides treat the two as identical, or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied gaddinashini for the purpose of disconnecting it from primogeniture . . . . It is clear that the Subordinate Judge had no suspicion that the evidence applying to gaddinashini could be taken as not applying to primogeniture. The first suggestion of such a distinction comes from the High Court. Their Lordships think that when the witnesses affirm or deny gaddinashini they mean to affirm or deny primogeniture ; and their constant identification of the two things shews how closely they are connected in the minds of the families of that part of the country. The custom of gaddinashini has clearly an important bearing on that of primogeniture, though the connection between them may not be a necessary one."

Their Lordships think that these observations are directly applicable to the case before them. The language in which the Rajah of Mursan spoke of the custom of gaddinashini has

(1) L. R. 23 Ind. Ap. 147.

already been referred to. The respondent himself, in denying that the custom prevailed in his family, says: "By gaddinashini or masnadnashini I mean the practice of one person or the eldest son succeeding to the whole estate, and the other sons only getting maintenance." Kharag (a son of Jiwaram) says: "By gaddinashini I mean that he (gaddi nashin) used to sit on a gaddi and receive nazar, and one son inherited the property, while the other sons received maintenance." Kashi Ram, the jaga (bard or genealogist) of the Beswan family (whose father and grandfather were jagas before him), after deposing to the custom, says: "I call that gaddinashini, that is, that the eldest son sits on the gaddi, and younger sons receive maintenance." And expressions of this kind, shewing the identification in the minds of the witnesses of the right of sitting on the gaddi with succession to the estate, constantly occur in the course of the evidence. There are five witnesses who say they saw Jey Kishore sit on the gaddi and receive nazar. There are seven witnesses who say they saw Girdhar do so, and there are numerous witnesses who saw Girparshad.

Their Lordships agree with the High Court that a good deal of the evidence of statements made by deceased persons is of doubtful admissibility. By s. 32, sub-s. 5, of the Evidence Act, such statements are relevant when they relate to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised. For this purpose, and to this extent, statements of deceased relatives and servants and dependents of the family are admissible. By s. 49, when the Court has to form an opinion on (inter alia) the usages of any family, the opinions of persons having special means of knowledge thereon are also relevant. But by s. 60, if oral evidence refers to an opinion or the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom, and to state as the grounds of that opinion information derived from deceased persons, and

J. C.

1900

GARURUDHWAJA PARSHAD SINGH v. SAPARANDHWAJA PARSHAD SINGH.

the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay, and not mere repetition of hearsay. In this way some of the evidence of such witnesses as Kharag, a son of Jiwaram, of Parshad, a nephew of Lala Lachminarain, who was dewan at Beswan for about twenty-five years, of Keheri Singh, a descendant of Sakat, who made out a genealogical tree of Nandram's family from the information of his grandfather, of Ganga Ballabh, and others of the same class, would, perhaps, be admissible evidence of the custom, and when corroborated by the proved facts, as to the descent of the estate during the last eighty years, is not without value. But their Lordships would not be disposed to place much reliance upon it standing alone.

Another case of evidence consists of the wajib-ul-arzes of various villages comprised in the taluka. The plaintiff put in evidence ten of these documents compiled in the years 1862 and 1863. They do not support the appellant's case, and they afford negative evidence against it, because they contain a provision for the appointment of lambardar in certain events according to the will of the co-sharers, and in one of them, relating to the village Bhawan, it is said that if there be no son then one of the heirs shall be the lambardar with the consent of the other heirs. On the other hand, the appellant also put in evidence the wajib-ul-arzes of ten villages compiled in the year 1873. They contain a declaration by Girparshad himself of the custom : "After my death my eldest son, if he is fit and well-behaved, shall, according to the custom and usage of any family, succeed me to the gaddi, and the other sons, if they are fit, shall receive Rs. 200 a month, and if they are unfit, Rs. 50 a month." Their Lordships do not place much reliance on these later documents, which are only an expression of the opinion or aspiration of Girparshad himself. The documents of 1862 and 1863 are no doubt evidence in favour of the respondent, but their Lordships do not think that they are sufficient to outweigh the evidence afforded by the actings of the parties and actual descent of the estate, and

other evidence in favour of the appellant to which they have already adverted.

J. C.
1900
GARURUDH-WAJA PARSHAD SINGH v. SAPARANDH WAJA PARSHAD SINGH.

Their Lordships are fully sensible of the importance of requiring that a special family custom involving a departure from the ordinary Hindu law should be properly proved, but they think that in this case the appellant has satisfied the burden of proof. They will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed, and instead thereof the respondent's appeal to that Court be dismissed with costs. The respondent will also pay the costs of this appeal.

Solicitors for appellant: *Barrow & Rogers.*

INDEX.

ABANDONMENT BY A PARTNER OF HIS INTEREST : *See* PARTNERSHIP.

ACCOUNTS : *See* PARTNERSHIP.

ACKNOWLEDGMENT : *See* USUFRUCTUARY MORTGAGE.

ACT XIV. OF 1855, s. 1, Cl. 15 : *See* USUFRUCTUARY MORTGAGE.

ACT XV. OF 1877, Art. 12 (a) : *See* PRACTICE. 4.

ACT XV. OF 1877, Art. 124 : *See* RELIGIOUS ENDOWMENT.

ADMISSIBILITY OF EVIDENCE : *See* INDIAN EVIDENCE ACT, s. 32.

ADMISSIBILITY OF STATEMENTS BY DECEASED PERSONS : *See* CUSTOM OF PRIMOGENITURE.

ADOPTION OF MEMBERS OF A TARAVAD : *See* CUSTOM.

ADVERSE POSSESSION BY PURCHASER : *See* RELIGIOUS ENDOWMENT.

AGREEMENT NOT TO BID: *See* PETITION TO SET ASIDE EXECUTION SALE.

ALLUVIAL LANDS : *See* REG. XI. OF 1825.

AMENDMENT OF DECREE ULTRA VIRES : *See* PRACTICE. 3.

APPEALABLE ORDER : *See* MESNE PROFITS.

ARREARS OF MAINTENANCE : *See* HINDU LAW. 2.

ATTACHMENT : *See* EXECUTION.

AUTHORITY TO ADOPT : *See* HINDU ADOPTION.

BOUGHT AND SOLD NOTES : *See* CONTRACT.

CENTRAL PROVINCES ACT (XVIII. of 1881), s. 87 : *See* JOINT ESTATE.

CIVIL PROCEDURE CODE, Ss. 206, 623 : *See* PRACTICE. 3.

——**s. 211** : *See* MESNE PROFITS.

——**s. 311** :

See PRACTICE. 4.

PETITION TO SET ASIDE EXECUTION SALE.

——**ss. 2, 540, 588** : *See* MESNE PROFITS.

——**s. 626** : *See* PRACTICE. 1.

COMPROMISE AFTER DECREE : *See* PRACTICE. 3.

CONCURRENT FINDINGS OF FACT : *See* PRACTICE. 2.

CONSTRUCTION :

See HINDU WILL.

MORTGAGOR.

COVENANT TO PAY MONTHLY INTEREST : *See* MORTGAGOR.

CONTRACT—*Bought and Sold Notes—Variance.*

In an action for not taking delivery of paddy, it appeared that the bought note signed by the appellants contained the term—expressed in Chinese, which the respondents did not understand—that there should be no yellow grains, whilst the sold note signed by the respondents did not contain it :—

Held, that if the respondents did not assent to this term there was no contract ; if they did, the paddy tendered was not on the evidence in accordance with the term. In either view the action must be dismissed. AH SHAIN SHOKE *v.* MOOTHIA CHETTY **30**

CUSTOM—*Nairs of South Malabar—Adoption of Members of a Taravad—Powers of Karnavan.*

Among the Nairs in South Malabar the karnavan of a Taravad has large powers of management, limited as regards alienation. He can adopt females into the Taravad when necessary to preserve it, but he cannot adopt strangers into the family, so as to make them and their descendants heirs to its property, without the consent of the other members, in the absence of necessity or of a proved custom to that effect. THIRUTHIPALLI RAMAN MENON *v.* VARIANGATTIL PALISSERI RAMAN MENON . . . **231**

CUSTOM OF PRIMOGENITURE—*Evidence—Indian Evidence Act, s. 32, sub-s. 5 ; ss. 49, 60—Admissibility of Statements by deceased Persons.*

Held, on the evidence, reversing the judgment of the High Court, that the appellants had satisfied the serious burden of proving a special family custom of descent by primogeniture.

The evidence shewed that for a period of nearly eighty years from the time of the British occupation of the district in which lay the estate in suit, the enjoyment had been consistent with the alleged custom, and for the earlier and greater part of that term had been inconsistent with any other legal basis. Also, that in two other families in the same district, derived from the same ancestor as the parties to the suit, the alleged custom prevailed.

A witness may state his opinion as to the

CUSTOM OF PRIMOGENITURE—*continued.*

existence of a family custom, and give as the grounds thereof information derived from deceased persons. But it must be independent opinion based on hearsay, and not mere repetition of hearsay: see Indian Evidence Act, s. 32, sub-s 5; ss. 49 and 60. Its weight depends on the character of the witness and of the deceased persons. GARURUDHWAJA PARSHAD SINGH *v.* SAPARANDHWAJA PARSHAD SINGH - - 238

DAKHILAS: *See* MESNE PROFITS.

DEEDS OF SALE AND REPURCHASE—*Mortgage—Right to Redeem—Regulation I. of* 1798—*—Regulation XVII. of* 1806—*Indian Evidence Act*, 1872, *s.* 92.

Where deeds of conditional sale of a talook with a proviso for repurchase on a fixed date contained clauses to the effect that the vendor may deposit "by virtue of this agreement" the amount due on repurchase in a mode similar to that provided by Regulation I. of 1798, and to the effect that the said amount should include, not merely the original price, but also a debt due on another property:—

Held, that the latter debt was thereby consolidated with the original price and charged on the talook, and that consequently the deeds of conditional sale must be regarded entirely as mortgages within the meaning of Regulation I. of 1798, and Regulation XVII. of 1806.

Oral evidence of intention is inadmissible for the purpose either of construing the deeds or of proving the intention of the parties: see s. 92 of Evidence Act, 1872.

Quaere, whether conditional sales become subject to an equity of redemption by force of those regulations in the absence of any indication contained therein that they are intended to be mortgages. BALKISHEN DAS *v.* LEGGE - 58

DEGREE OF WEIGHT TO BE ATTACHED TO INFERENCES AND PROBABILITIES: *See* EVIDENCE OF MARRIAGE.

DILUVIATED LANDS—*Reformed Lands—Evidence of Identity—Thak and Survey Maps.*

Where the evidence is reasonably sufficient to establish the identity of the sites of reformed lands in suit with the sites of lands belonging to the plaintiffs before diluviation they are entitled to recover in ejectment.

The onus is not on the plaintiffs to prove that the area and boundaries before diluviation were accurately represented on the thak map of that period and that the sites in suit exactly correspond therewith. Discrepancies between the thak boundaries and the existing state of the locality may be accounted for:—

Held, in this case, that the agreement of the boundaries of the lands in suit with those in the survey map were sufficient evidence of identity. MONMOHINI DEBI *v.* ROBERT WATSON & Co. 44

DISALLOWANCE OF MANAGER'S CHARGES WHERE ACCOUNTS ARE NOT KEPT: *See* PARTNERSHIP.

EFFECT OF PARTITION ON STATUS OF THE FAMILY: *See* HINDU LAW. 2.

EJECTMENT—*Title by Adverse Possession.*

To constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity, and in extent, and is displaced by evidence of partial possession by the defendant. RADHAMONI DEBI *v.* THE COLLECTOR OF KHULNA - - 136

ESTOPPEL: *See* USUFRUCTUARY MORTGAGE.

EVIDENCE: *See* CUSTOM OF PRIMOGENITURE.

EVIDENCE OF IDENTITY: *See* DILUVIATED LANDS.

EVIDENCE OF MARRIAGE—*Effect of Direct Evidence—Decree of Weight to be attached to Inferences and Probabilities.*

Held, on the evidence, reversing the judgment of the High Court, that the marriage of the appellant to a Rajah since deceased was established.

Direct evidence of the fact of marriage, strongly corroborated by circumstances, even though derived from a period after the Rajah's death, can only be rebutted by the most cogent contrary inferences from the circumstances of the parties, and ought not to be disregarded on the ground of mere general improbabilities inherent therein. LUCHMI KOER *v.* CHOWDHRY MOHUNT ROGHU NATH DAS - - - - - - - 142

EXECUTION—*Attachment—Sale.*

Where an execution sale was ordered and made in execution of three decrees, two of them against one brother alone and the third against three brothers jointly, and separate attachments and separate sale proclamations were made in all three cases:—

Held, that the sale operated a transfer of all three brothers' interest in the attached lands. TARA LAL SINGH *v.* SAROBUR SINGH - 33

EXECUTION SALE: *See* PRACTICE. 4.

EXECUTORS CANNOT BE AUTHORIZED TO ADOPT: *See* HINDU ADOPTION.

FINAL ORDER IN THE EXECUTION DEPARTMENT: *See* MESNE PROFITS.

GIFT TO ADOPTED SON: *See* HINDU WILL.

HINDU ADOPTION—*Authority to Adopt—Executors cannot be Authorized to Adopt.*

Where a Hindu by his will authorized an adoption by his widow and his executors jointly, and by his executors after her death:—

Held, that the authority was invalid. The will was incapable of the construction that authority was in reality given to the widow restricted by the consent of the executors. AMRITO LAL DUTT *v.* SURNOMOYE DASI - - 128

HINDU LAW—*Illegitimate Son—Right to Maintenance.*

Among Hindus of the twice-born classes an illegitimate son takes no part in the inheritance; but he is entitled to maintenance from the estate of his father.

Chuoturya Run Murdun Syn v. *Sahub Purhulad Syn*, (1857) 7 Moore's Ind Ap. Ca. 50, followed.

The right to maintenance is a personal right,

HINDU LAW—*continued.*

and is not heritable. ROSHAN SINGH *v.* BALWANT SINGH - - - - - - 51

2. —— *Effect of Partition on Status of the Family—Rights to maintenance against Holder of Impartible Estate—Arrears of Maintenance.*

In a suit for general partition of Hindu family estate the plaintiff succeeded with regard only to a small portion thereof, the bulk being held to be impartible :—

Held, that the Hindu family did not in consequence of these proceedings become a divided one ; and that as regards the impartible estate the younger brothers retained their rights of maintenance.

With regard to arrears of maintenance, past non-payment does not necessarily give a right of action : it is a prima facie proof of wrongful withholding. Where the evidence shews that the holder of the estate was unwilling to pay and denied the right, that prima facie proof is not rebutted. RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU *v.* RAJA YARLAGADDA DURGA PRASADA NAYUDU RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYUDU *v.* RAJA YARLAGADDA VENKATA RAMALINGAMMA - 151

HINDU WILL—*Construction—Gift to Adopted Son—Persona Designata.*

Where a testator recited in his will that he had been keeping a minor as his adopted son, and thereby gave properties to him absolutely, describing him as adopted son :—

Held, that by the true construction of the will the gift was not conditional upon adoption having been effected. SUBBARAYER *v.* SUBBAMMAL - - - - - - 162.

ILLEGITIMATE SON : *See* HINDU LAW.

INDIAN EVIDENCE ACT, S. 32—*Admissibility of Evidence—Pedigree.*

Sect. 32 of the Indian Evidence Act, which makes statements in a pedigree relevant, only applies when the statements are made by persons who cannot be produced as witnesses. Accordingly, a pedigree is inadmissible in the absence of evidence to that effect. SURJAN SINGH *v.* SARDAR SINGH - - - - - - 183

INDIAN EVIDENCE ACT, s. 32, sub-s. 5; ss. 49, 60 : *See* CUSTOM OF PRIMOGENITURE.

INDIAN EVIDENCE ACT, ss. 65, 66, 74, 86—*Uncertified Record of Proceedings in Court—Secondary Evidence—Public Document.*

The record of proceedings in a court of justice is presumed to be genuine and accurate if it is certified as directed by s. 86 of the Indian Evidence Act. But the proceedings may be proved by an official of the Court speaking to what takes place in his presence, and also to an uncertified record thereof. The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74), admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction. HARANUND ROY CHETLANGIA *v.* RAM GOPAL CHETLANGIA - - - - 1

INDIAN EVIDENCE ACT, s. 92—*Recital in Sale Deed of Payment of Purchase-money—Oral Evidence admissible to Contradict Recital—Proof of Collateral Agreement.*

Sect. 92 of the Indian Evidence Act does not preclude oral evidence to contradict a recital of fact in a written contract.

It is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid :—

Held, in this case, that the vendor might prove a collateral agreement that the purchase-money should remain with the purchaser for a specified purpose. SAH LAL CHAND *v.* INDARJIT - 93

INTEREST : *See* MESNE PROFITS.

IRREGULARITY OF SALE : *See* PRACTICE. 4.

JOINT ESTATE—*Title of Co-parcener by Survivorship—Separate Record of the Widow does not effect Partition — Limitation—Central Provinces Act (XVIII of 1881), s. 87.*

Where a Hindu and his widow had successively held the estate in suit as joint family estate in co-parcenary with the appellant or his predecessor :—

Held, that the appellant succeeded at the widow's death.

Though the widow was recorded under an award by the Collector in the settlement records as owner of an 8-anna share of the estate for her lifetime, that did not operate a separation in title or alter its devolution.

Sect. 87 of Central Provinces Land Revenue Act (XVIII. of 1881) did not affect the appellant's claim, for the award related solely to the widow's interest. REWA PRASAD SUKAL *v.* DEO DUTT RAM SUKAL - - - - - - - - 39

JUDGMENT IN REVIEW : *See* PRACTICE.

LIMITATION :

See JOINT ESTATE.
PRACTICE. 4.
RELIGIOUS ENDOWMENT.

LIMITATION IN EXECUTION PROCEEDINGS :

See PRACTICE. 3.

MESNE PROFITS—*Code of Civil Procedure, s. 211—Final Order in Execution Department—Appealable Order—Code of Civil Procedure, ss. 2, 540, 588.*

A decree in ejectment, dated November 12, 1887, declared the plaintiff entitled to future mesne profits, and was eventually affirmed by the Queen in Council on May 11, 1895 :—

Held, that mesne profits were recoverable up to May 11, 1895, and (see s. 211 of the Limitation Act) for a further period not exceeding three years until recovery of possession.

An order of the District Court in execution proceedings limiting the recovery of mesne profits to three years from November 12, 1887, is in the nature of a final decree as defined by s. 2 of the Civil Procedure Code, and is appealable under s. 540. RAJA BHUP INDAR BAHADUR SINGH *v.* BIJAI BAHADUR SINGH - - - - 209.

MESNE PROFITS—*continued.*

2. —— *Rents which might have been Recovered by ordinary Diligence—Dakhilas—Report of Amin—Admission of further Evidence—Interest.*

Where a decree in ejectment directs that mesne profits be ascertained :—

Held, that, according to the true construction of s. 211 of the Civil Procedure Code, the account should include whatever rents according to the prevailing rates the defendants might have recovered by ordinary diligence in respect of the lands decreed.

In taking the account dakhilas are frequently important but not necessary evidence.

The report of an Amin appointed to conduct a local inquiry as to mesne profits is made evidence by s. 393 of the Code. and it would defeat the object of local investigation if it were set aside and a fresh investigation made by the Court as a matter of course. New evidence should not be given without the leave of the Court.

The expression "mesne profits" in a decree includes interest thereon (see s. 211 of Civil Procedure Code of 1882), but may not be allowed for any time later than three years from date of decree. GIRISH CHUNDER LAHIRI *v.* SHOSHI SHIKHARESWAR ROY - - - - - 110

MORTGAGE · *See* DEEDS OF SALE AND REPURCHASE.

MORTGAGE OF WATAN PROPERTY BY A TRESPASSER : *See* WATAN.

MORTGAGOR—*Construction — Covenant to pay Monthly Interest.*

Where a mortgagor covenanted to pay a fixed sum at the expiration of a year with interest at the rate of 10 per cent. per annum, and in default with interest at the same rate until actual repayment, and that he "will pay all such interest month by month" : —

Held, in a suit brought before the due date of the mortgage, that, by the true construction of those words, and, having regard to clauses in the deed which contemplated interest becoming due and in arrear before that date, monthly interest was payable from the execution of the deed. YEO HTEAN SEW *v.* ABU ZAFFER KOREESHEE - 98

NAIRS OF SOUTH MALABAR : *See* CUSTOM.

NULLITY OF SALE : *See* PRACTICE. 4.

ORAL EVIDENCE ADMISSIBLE TO CONTRADICT RECITAL : *See* INDIAN EVIDENCE ACT, S. 92.

PARDANASHIN : *See* PRINCIPAL AND SURETY.

PARTNERSHIP—*Abandonment by a Partner of his Interest—Accounts—Disallowance of Manager's Charges where Accounts are not kept.*

However precarious the subject-matter of a partnership may be, it is a matter of inference to be drawn from the facts of each case whether or not a partner has either abandoned his interest therein, or lost it by laches. Evidence that he declined to advance more money for partnership purposes, and left with occasional intervention the management to a co-partner, was held in the

PARTNERSHIP—*continued.*

circumstances to be wholly insufficient to shew that he had lost his position.

Where a managing partner mixes up his private affairs with those of the partnership, and omits to keep clear accounts of any kind, the Court acts rightly in disallowing all disputed charges made by him even at the risk of disallowing to him expenses honestly incurred. MOUNG THA HNYIN *v.* MAH THEIN MYAH - 189

PEDIGREE : *See* INDIAN EVIDENCE ACT, s. 32.

PERSONA DESIGNATA : *See* HINDU WILL.

PETITION TO SET ASIDE EXECUTION SALE—*Only Grounds stated can be relied upon—Civil Procedure Code, s. 311—Position of Decree-holder with Leave to Bid—Agreement not to Bid.*

A decree-holder who obtains leave to bid is in the same position as any other purchaser, subject to no exceptional restrictions.

Woopendro Nath Sircar v. *Brojendronath Mundal*, (1881) Ind. L. R. 7 Calc. 346, considered.

An agreement between persons not to bid is no ground for setting aside a sale in execution under s. 311 of the Code of Civil Procedure.

Where the petition to set aside a sale did not allege, as one of its grounds, that the decree-holder had improperly obtained leave to bid by omitting to mention such agreement, and no issue was raised or investigation made upon the matter :—

Held, that the High Court in appeal ought not to have set aside the sale on that ground. MAHOMED MEERA RAVUTHAR *v.* SAVVASI VIJAYA RAGHUNADHA GOPALAR - - - 17

POSITION OF DECREE-HOLDER WITH LEAVE TO BID : *See* PETITION TO SET ASIDE EXECUTION SALE.

PRACTICE—*Special Leave—Judgment in Review—Code of Civil Procedure, s. 626.*

Reasons should be recorded by the judge under s. 626 of the Code of Civil Procedure when granting an order for review, but their absence is not ground for special leave to appeal. THAKUR SHANKAR BUKSH *v.* BALWANT SINGH. *Ex parte* THAKUR SHANKAR BUKSH - - - - 79

2. ——*Concurrent Findings of Fact.*

Concurrent judgments of the Courts below on matters of fact, although open to argument before their Lordships, will not be interfered with unless very definite and explicit grounds for that interference are assigned. MOUNG THA HNYEEN *v.* MOUNG PAN NYO - - - - 166

3. ——*Compromise after Decree—Amendment of Decree ultra vires—Civil Procedure Code, ss. 206, 623—Limitation in Execution Proceedings.*

After two of the defendants to an ejectment decree had applied to the High Court for leave to appeal, one of them compromised with the plaintiff, and the High Court thereupon amended its decree in terms of the compromise :—

Held, that this amendment was not authorized by either s. 206 or s. 623 of the Civil Procedure Code, and was ultra vires and inoperative. The proper course to adopt was to make the compromise a rule of Court, and stay all proceedings under the decree against the defendant party

PRACTICE—*continued.*

thereto, except for the purpose of enforcing the compromise against him :

Held, also, on a petition for execution of the decree, that the limitation period ran from the date of the first and not the amended decree of the High Court, and was barred as against the respondent, who was no party to the compromise. RAJAH KOTAGIRI VENKATA SUBBAMMA RAO *v.* RAJAH VELLANKI VENKATRAMA RAO - 197

4.——*Execution Sale—Nullity Sale—Irregularity of Sale—Limitation Civil Procedure Code, S.* 311—*Act XV. of* 1877, *art.* 12 (*a*).

Redemption of a mortgage was refused, as it appeared that the mortgaged property had been sold in execution of a decree against the mortgagor, and that the plaintiff had neglected and refused to pray that it might be set aside.

An execution sale cannot be treated as a nullity if the Court which sells has jurisdiction to do so ; and it cannot be set aside as irregular without an issue raised for that purpose and investigation made with the judgment creditor as a party thereto, nor under s. 311 of the Civil Procedure Code and art. 12 (*a*) of the Limitation Act, 1877, after one year from the date thereof.

An execution Court does not lose jurisdiction to sell because it serves notice on a person who does not represent the deceased judgment debtor, and afterwards erroneously decides that he does. Such decision is valid unless set aside in due course of law. MALKARJUN BIN SHIDRAMAPPA PASARE *v.* NARHARI BIN SHIVAPPA - - 216

PRINCIPAL AND SURETY—*Stipulation that Surety should not be discharged by time given to Debtor—Pardanashin.*

The appellants, in becoming sureties to the respondent bank, covenanted that though as respects the principal debtor they should be considered as sureties only, yet as regards the bank they should "be considered as principal debtors," so as not to be exonerated from liability by any dealings between the bank and the principal debtor, which would otherwise have that effect :—

Held, that the appellants became liable as principals to the bank immediately on the default of the principal debtor, and were not discharged by reason of time having been given to him. The effect of the deed being plain, neither appellant could escape liability except by proof of misrepresentation or undue influence.

A woman cannot be held to be a quasi-pardanashin. If she is not actually a pardanashin, sufficient incapacity for business must be proved in order to throw upon those dealing with her the duty of taking special precautions. HODGES *v.* DELHI AND LONDON BANK, LIMITED - - - - - - 168

POWERS OF KARNAVAN : *See* CUSTOM.

PROBATE.

Probate is rightly granted where the judge believes the witnesses who speak to the execution of the will and the disposing mind of the testator.

The rule in *Tyrrell* v. *Painton*, [1894] P. 151, requiring proof that the testator actually knew and approved the contents of the will, does not

PROBATE—*continued.*

apply unless surrounding circumstances excite suspicion. SHAMA CHURN KUNDU *v.* KHETTROMONI DASI - - - - - 10

PROOF OF COLLATERAL AGREEMENT : *See* INDIAN EVIDENCE ACT, S. 92.

PUBLIC DOCUMENT : *See* INDIAN EVIDENCE ACT, SS. 65, 66, 74, 86.

RECITAL IN SALE DEED OF PAYMENT OF PURCHASE MONEY : *See* INDIAN EVIDENCE ACT, S. 92.

REFORMED LANDS : *See* DILUVIATED LANDS.

REGULATION I. OF 1798 : *See* DEEDS OF SALE AND REPURCHASE.

REGULATION XVII. OF 1806 : *See* DEEDS OF SALE AND REPURCHASE.

REGULATION XI. OF 1825, s. 4, sub-ss. 1, 5—*Alluvial Lands—Title on Re-emergence.*

Land submerged by the wanderings of a river from its course, and afterwards re-emerging in a form capable of being identified, does not cease to belong to its original owner. The adjoining proprietor cannot make title to it either under sub-s. 1 or sub-s. 5 of Regulation XI., 1825, s. 4, or on any known principle. SARDAR JAGJOT SINGH *v.* RANI BRIJNATH KUNWAR - 81

RELIGIOUS ENDOWMENT—*Void Sale of Hereditary Trusteeship—Adverse Possession by Purchaser—Act XV. of* 1877, *art.* 124—*Limitation.*

Where hereditary trustees of a religious endowment sold their hereditary right of management and transferred the endowed property :—

Held, that the sales were null and void, in the absence of a custom allowing them ; and that the possession taken by the purchaser was adverse to the vendors and those claiming under them.

Rajah Vurmah Valia v. *Ravi Vurmah Mutha*, (1876) L. R. 4 Ind. Ap. 76, followed.

Art. 124 of Act XV. of 1877. Sched. II., applies. There is no distinction between the office and the property.

The office and title being hereditary, no new cause of action accrued to the respondent on the death of his father, the vender. To hold in favour of the successive life estates of father and son would be opposed to the ruling in *Tagore* v. *Tagore*, L. R. Ind. App. Supp. 47, which is applicable to an hereditary office and endowment as well as to other immoveable property. GNANASAMBANDA PANDARA SANNADHI *v.* VELU PANDARAM - - - - 69

RENTS WHICH MIGHT HAVE BEEN RECOVERED BY ORDINARY DILIGENCE: *See* MESNE PROFITS.

REPORT OF AMIN : *See* MESNE PROFITS.

RESTRICTION OF ALIENATION INCIDENT TO WATAN TENURE : *See* WATAN.

RIGHT TO MAINTENANCE : *See* HINDU LAW. 1.

RIGHT TO REDEEM : *See* DEEDS OF SALE AND REPURCHASE.

RIGHTS TO MAINTENANCE AGAINST HOLDER OF IMPARTIBLE ESTATE: *See* HINDU LAW. 2.

SALE: *See* EXECUTION.

SECONDARY EVIDENCE: *See* INDIAN EVIDENCE ACT, ss. 65, 66, 74, 86.

SEPARATE RECORD OF THE WIDOW DOES NOT AFFECT PARTITION: *See* JOINT ESTATE.

SPECIAL LEAVE: *See* PRACTICE.

STIPULATION THAT SURETY SHOULD NOT BE DISCHARGED BY TIME GIVEN TO DEBTOR: *See* PRINCIPAL AND SURETY.

SUIT BY MORTGAGORS FOR POSSESSION: *See* USUFRUCTUARY MORTGAGE.

THAK AND SURVEY MAP: *See* DILUVIATED LANDS.

TITLE BY ADVERSE POSSESSION: *See* EJECTMENT.

TITLE OF CO-PARCENER BY SURVIVORSHIP: *See* JOINT ESTATE.

TITLE ON RE-EMERGENCE: *See* REGULATION XI. OF 1825.

UNCERTIFIED RECORD OF PROCEEDINGS IN COURT: *See* INDIAN EVIDENCE ACT, ss. 65, 66, 74, 86.

USUFRUCTUARY MORTGAGE—*Suit by Mortgagors for Possession—Act XIV. of* 1859, *s.* 1, *cl.* 15—*Acknowledgment—Estoppel.*

A mortgagor's suit for possession under a usufructuary mortgage dated October 17, 1788, is barred on October 17, 1848, by Act XIV of 1859, s. 1, cl. 15, unless brought before January 1862, or unless previous to October 17, 1848, an acknowledgment of the mortgage in terms of the clause is given, signed by the mortgagees or some person claiming under them.

A grant after 1848 of a lease or part of the property in suit to the mortgagor by the mortgagee describing himself as the usufructuary mortgagee does not revive an extinct right and does not preclude the lessor from asserting his true title, nor does it amount to a representation which he is bound to make good, not being an essential part of the contract of lease.

Citizens' Bank of Louisiana v. *First National Bank of New Orleans*, (1873) L. R. 6 H. L. 360, followed. FATIMATULNISSA BEGUM *v.* SOONDER DAS - - - - - - - - - **103**

VARIANCE: *See* CONTRACT.

VOID SALE OF HEREDITARY TRUSTEESHIP: *See* RELIGIOUS ENDOWMENT.

WATAN — *Mortgage of Watan Property by a Trespasser—Restriction on Alienation incident to Watan Tenure.*

An alienation by way of mortgage of any portion of watan property has no effect beyond the life of the watandar.

Kalu Narayan Kulkarni v. *Hanmapa bin Bhimapa*, (1879) Ind. L. R. 5 Bomb. 435, approved.

The restriction is incident to the tenure, and accordingly, where a de facto watandar without legal title other than that by adverse possession mortgaged, the title of her heir prevailed over that of her alienee. PADAPA BIN BHUJANGAPA *v.* SWAMIRAO SHRINIWAS - - - - - **86**

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, LIMITED, STAMFORD STREET AND CHARING CROSS.